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The Compensability of Cardiac Conditions Under Wyoming Worker's Compensation: Health Insurance or Worker's Compensation?

INTRODUCTION

Heart attack cases present very difficult causation problems in worker's compensation claims. The disease which eventually results in a heart attack builds up over a period of years and the medical authorities have not been able to determine what actually causes the attack.¹ It is estimated that nearly half of all deaths in the United States are caused by coronary disease and many individuals suffer severe disability as a result of the disease.² The medical costs for treating heart injuries are staggering and far exceed the costs of treating other injuries.³

With this problem in mind, the Wyoming Legislature attempted to reduce the number of heart injuries compensable under the Worker's Compensation Act.⁴ The methods the legislature adopted are arbitrary and confusing. To further compound the problem, the Wyoming Supreme Court sought to formulate its own remedy and created a new class of beneficiaries. The problems in the statute cannot be cured by the judiciary and the legislature must enact a new statute or even consider abolishing heart attack compensation altogether.

This comment first examines the theory underlying the enactment of worker's compensation laws, and then defines some of the terms regularly used in cardiovascular compensation cases. Although section 27-12-603(b) of the Wyoming statutes⁵ could conceivably cover various types of cardiac conditions, this comment will only examine the compensability of myocardial infarctions. Second, a review of section 27-12-603(b) will reveal that an injured worker must establish two basic requirements before he can recover for a heart injury: medical causation and legal causation. Third, two workable standards will be proposed for compensating heart attack victims.

BACKGROUND

Worker's Compensation

A brief overview of the rationale behind the general worker's compensation law is helpful in understanding the confusing requirements for com-

1. Comment, *The Meaning of the Term "Accident" in the Indiana Workmen's Compensation Act*, 13 VAL. U.L. REV. 535, 554 (1979).

2. The American Heart Association estimated that 985,040 people died of cardiovascular disease in 1982, nearly fifty percent of all deaths. Almost one-fifth of all persons killed by cardiovascular disease are under age sixty-five. About 43,500,000 Americans have one or more forms of heart or blood vessel disease. AMERICAN HEART ASSOCIATION, HEART FACTS (1985).

3. Juge & Phillips, *A New Standard for Cardiovascular Claims in Workers' Compensation*, 43 LA. L. REV. 17, 18 (1982).

4. WYO. STAT. § 27-12-603(b) (1977).

5. *Id.*

pensating heart attacks in Wyoming. Worker's compensation laws were widely adopted in the early part of the twentieth century.⁶ The Wyoming Legislature also recognized the need for a new system to compensate workers for employment-related injuries. In order to accommodate the needs of both employers and workers, the legislature developed a compromise which gave both groups certain benefits. Employers were granted immunity from suits in return for their contributions to the compensation fund.⁷ Workers received speedy relief for work-related injuries, regardless of the lack of fault on the part of the employer and without the cost of legal action.⁸

Recently, serious questions have arisen concerning the fairness of worker's compensation laws. The employers' immunity from law suits has remained in place thereby precluding a worker from obtaining increasingly large judgments, while the benefits workers receive have remained low.⁹ As the United States Congress stated in the Occupational Health and Safety Act of 1970: "In recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of . . . new risks to health and safety, and increases in the general level of wages and the cost of living."¹⁰

The Wyoming Legislature's failure to maintain an evenly balanced compromise between the interests of the employer and the interests of the worker has been addressed by the courts with sympathy towards the worker.¹¹ The Wyoming Supreme Court has acknowledged an intention to liberally construe the coverage provisions of worker's compensation acts and to narrowly construe the immunity provisions.¹² The result of the liberal construction of the law in this area has been to place the financial burden for accidents on the industry rather than the individual worker.¹³

Medical Terminology

A reading of decisions in cardiovascular compensation cases reveals a judiciary that is at times confused by medical evidence. In order to effectively understand the area of cardiovascular compensation cases, lawyers must have a general background in cardiovascular terminology.

6. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 4, 5, at 23-40 (1978).

7. *Id.*

8. *Meyer v. Kendig*, 641 P.2d 1235, 1238 (Wyo. 1982), quoting *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 658 (6th Cir. 1979), cert. denied, 444 U.S. 836 (1979).

9. *Id.*

10. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 27, 84 Stat. 1616 (omitted from the United States Code as executed 29 U.S.C.S. § 676 (Law. Coop. 1982)), cited in *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 659 n.5 (6th Cir. 1979).

11. *In re Gimlin's Claim*, 403 P.2d 178, 180 (Wyo. 1965).

12. *Id.*

13. *Wyoming State Treas. ex rel. Worker's Comp. Div. v. Boston*, 445 P.2d 548, 551 (Wyo. 1968).

Cardiovascular Disease

Cardiovascular disease or atherosclerosis is the build-up of plaque¹⁴ within the arteries of the human body. The plaque is deposited in the arteries as a person grows older.¹⁵ This build-up of cholesterol-plaque is influenced by numerous factors but the most important factors are: (1) the genetics of the person, (whether the person's family has a history of heart disease); (2) smoking; (3) hypertension, (high blood pressure); and (4) diabetes.¹⁶ Factors which influence the progression of cardiovascular disease are called "risk factors."¹⁷

The build-up of plaque in the arteries continues¹⁸ until the build-up reaches a critical point. When the build-up reaches a critical point, a myocardial infarction may occur.¹⁹

Myocardial Infarctions

A myocardial infarction is defined as a sudden insufficiency of arterial blood supply to the cardiac or heart muscle.²⁰ A myocardial infarction can affect different parts of the heart muscle. Therefore, myocardial infarctions are further defined according to what portion of the heart the infarction affects.²¹ In layman's terms, a myocardial infarction is a heart attack.

Keeping this definition in mind, we can now determine what happens to a person who suffers a heart attack. For some reason,²² one or more of the arteries supplying the heart muscle "plug up." The heart muscle is then deprived of needed nutrients and oxygen.²³ This causes that part of the heart muscle to die,²⁴ resulting in permanent damage to the heart muscle because the heart muscle cannot rejuvenate itself.²⁵

14. Plaque is a buildup in the arterioles containing lipid deposits. T. STEDMAN, *STEDMAN'S MEDICAL DICTIONARY 1095* (5th ed. 1982). See also Juge & Phillips, *supra* note 3, at 19.

15. Atherosclerosis is characterized by irregularly distributed lipid or cholesterol deposits in the interior of large and medium sized arteries. These deposits are associated with fibrosis and calcification, and are almost always present, to some degree, in the middle-aged and the elderly. T. STEDMAN, *supra* note 14, at 136.

16. In addition to the four major factors listed in the text, the following factors have also been shown to contribute to atherosclerosis: (1) elevated cholesterol level in the blood; (2) inactive lifestyle; and (3) stress. Juge & Phillips, *supra* note 3, at 19-20.

17. *Id.*

18. *Id.*

19. See *infra* text accompanying notes 26-32.

20. T. STEDMAN, *supra* note 14, at 706.

21. *Id.* at 706-07.

22. See *supra* text accompanying notes 14-19.

23. Juge & Phillips, *supra* note 3, at 22-24.

24. *Id.*

25. *Id.* at 24.

Causes of Myocardial Infarctions

The exact triggering mechanism of a myocardial infarction is extremely difficult to pinpoint.²⁶ In fact, medical science has not yet determined exactly what occurs at the point in time that a myocardial infarction begins.²⁷ However, there are several theories of what causes the blockage in the artery and the resulting death of the heart tissue.

One of these theories is that a blood clot forms in an occluded area²⁸ of an artery, thereby impeding the flow of blood in the artery.²⁹ A second theory is that the artery spasms (constricts) and thereby closes the artery at the point of the occlusion.³⁰ A third theory³¹ is that some kind of damage occurs to the cells lining the artery causing them to release cholesterol which ultimately blocks the artery in the occluded area.³² In any event, the artery is somehow blocked in the occluded area.

THE LAW IN WYOMING

Section 27-12-603(b) of the Wyoming statutes provides that:

Benefits for employment-related coronary conditions except those directly and solely caused by an injury or disease are not payable unless the employee establishes by competent medical authority that there is a direct causal connection between the condition under which the work was performed and the cardiac condition, and then only if the causative exertion occurs during the actual period of employment stress clearly unusual to, or abnormal for, employees in that particular employment, and further that the acute symptoms of the cardiac condition are clearly manifested not later than four (4) hours after the alleged causative exertion.³³

In *In re McCarley*, the Wyoming Supreme Court held that in order to recover under section 27-12-603(b) a claimant must establish four re-

26. *Id.* at 22.

27. Helmuth & Helmuth, *Heart Attack and Workmen's Compensation: Model Rules of Practice*, 4 FORUM 113 (1969).

28. An occlusion is defined as the act of closing or the state of being closed. T. STEDMAN, *supra* note 14, at 974. Therefore, an occluded artery would be an artery that was partially blocked due to build-up of some material inside the artery. See *supra* text accompanying notes 16-20; Juge & Phillips, *supra* note 3, at 21. Technically, an occluded artery would be completely closed, but the courts and physicians generally call a narrowing of an artery an occlusion. To avoid confusion, we will call a narrowed area of an artery an occlusion.

Stenosis is the proper term that should be used to describe a narrowed area of an artery. Stenosis is defined as an abnormal narrowing of a body passage, opening, canal, or duct. 3 J. SCHMIDT, *SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE* S-170 (14th ed. 1984).

29. Juge & Phillips, *supra* note 3, at 22.

30. *Id.* at 22-23.

31. There are other theories concerning what causes the actual blockage in an artery which leads to a myocardial infarction but these three theories seem to have gained the most acceptance. See *id.* at 23.

32. *Id.*

33. WYO. STAT. § 27-12-603(b) (1977).

quirements: 1) A period of employment stress unusual or abnormal for employees in the same occupation as the claimant; 2) Some exertion during the period of unusual or abnormal employment stress; 3) Medical testimony evidencing a direct causal connection between the exertion and the myocardial infarction; and 4) That the acute symptoms of the cardiac difficulty manifested themselves within four hours after the allegedly causative exertion.³⁴

In order to recover for a work-related coronary condition, a claimant must prove that both medical causation and legal causation are present in regard to the claimant's condition. Under *McCarley*, legal causation is established by showing that requirement two is present. Medical causation is established if a claimant establishes requirement number three.³⁵ Legal causation focuses on the work and establishes the standard of exertion necessary for an employee to be compensated. Medical causation measures the causal connection between the work and the injury.

Medical Causation

A heart attack claimant must establish "by competent medical authority that there is a direct causal connection between the condition under which the work was performed and the cardiac condition."³⁶ This section of the statute states that a claimant must present some expert medical testimony but it does not provide any guidance as to the burden of proof a claimant must meet in order for the claimant to recover. To determine what kind of medical testimony is necessary, the case law interpreting this part of section 27-12-603(b) must be examined.

In *In re Vondra*,³⁷ a case decided before section 27-12-603(b) was enacted, the Wyoming Supreme Court ruled that in order to meet the medical causation requirement a claimant must show by a preponderance of the believable evidence "that the work effort contributed in a material degree to the precipitation, aggravation, or acceleration of the existing disease."³⁸ In *Kaan v. State ex rel. Wyoming Worker's Compensation Division*, the Wyoming Supreme Court clarified medical causation under section 27-12-603(b).³⁹ The court, after looking at earlier cases dealing with medical causation,⁴⁰ stated:

From the rules in the cases just cited we can distill a simple rule: The causal connection requirement is satisfied if a medical

34. *In re McCarley*, 590 P.2d 1333, 1335-36 (Wyo. 1979).

35. Requirements one and four further burden the legal causation requirement of number two. Presumably, the legislature included them in the statute to limit further the class of beneficiaries under the Act.

36. WYO. STAT. § 27-12-603(b) (1977).

37. 448 P.2d 313 (Wyo. 1968).

38. *Id.* at 318.

39. No. 84-44 (Wyo. Nov. 1, 1984).

40. *Wyoming State Treas. ex rel. Wyo. Worker's Comp. Div. v. Schwilke*, 649 P.2d 218, 220 (Wyo. 1982); *Yost v. Wyoming State Treas. ex rel. Wyo. Worker's Comp. Div.*, 654 P.2d 137, 139 (Wyo. 1982).

expert testifies that it is more probable than not that work exertion or stress contributed in a material degree to the precipitation, aggravation, or acceleration of a myocardial infarction.⁴¹

Even though the *Kaan* rule is simple and seems to set forth a workable standard, there are still serious problems with regard to medical causation under section 27-12-603(b). Medical causation attempts to determine the causal connection between the work and the injury. The medical causation requirement under section 27-12-603(b) does not accomplish this result because it is impossible to precisely determine what triggers a myocardial infarction. This problem is compounded by the fact that expert witnesses are willing to categorically state that a certain stress or strain precipitated a myocardial infarction.

The statute requires that a claimant produce "competent medical authority that there is a direct causal connection between the condition under which the work was performed and the cardiac condition."⁴² However, medical science has not at the present time determined what exactly triggers a myocardial infarction. In a study by a committee of the California Heart Association, a panel of five cardiologists, internists, and other physicians well experienced in heart disease, answered certain questions with regard to 319 compensation cases. In only forty-seven of the 319 cases did all five doctors agree on the cause of the heart attack. In ninety cases, four doctors agreed. And, in forty-eight cases, only two could agree. When 101 of the same cases were presented to the same five doctors without their knowledge that the records had been examined previously, in thirty percent of the cases, the doctors reversed themselves.⁴³ Therefore, testimony by a doctor that there is a direct causal connection would, in most cases, only be conjecture.

Claimants can usually find a physician to testify that a particular job stress more probably than not "contributed in a material degree to the

41. *Kaan v. State ex rel. Wyo. Worker's Comp. Div.*, No. 84-44, slip op. at 4 (Wyo. Nov. 1, 1984).

In *Nuanes v. State ex rel. Wyo. Worker's Comp. Div.*, No. 84-88 (Wyo. Jan. 23, 1985), Justice Rose reasoned that even though the testifying physician refused to specifically use the "magic words" of the *Kaan* decision, the court should inquire further and determine the expert's meaning from "the totality of the information produced during direct and cross examination." *Id.* at 3 (Rose, J., dissenting).

The medical causation requirement in *Kaan* is the only workable rule in the area of worker's compensation cardiac conditions. It would be unwise to follow Justice Rose's suggestion and erode this simple rule. Physicians don't know what exactly triggers a myocardial infarction, and the court should not further cloud an already obscure area. If a physician fails to testify that "it is more probable than not that the work exertion or stress contributed in a material degree to the precipitation, aggravation, or acceleration of a myocardial infarction," then the injured worker should not recover.

42. *Nuanes*, No. 84-88, slip op. at 4 (Wyo. Jan. 23, 1985).

43. See Comment, *Heart Attacks and the Pennsylvania Workmen's Compensation Act: Establishing the Causal Relationship Between Employment and Injury*, 81 DICK. L. REV. 111, 112 (1976), citing *Heart Claims Under the California Workmen's Compensation Act*, 13 CIRCULATION 448 (1956).

precipitation, aggravation, or acceleration of a myocardial infarction."⁴⁴ "Doctor shopping" is prevalent in worker's compensation cases.⁴⁵ Even though medical science has not accurately determined exactly what occurs when a myocardial infarction begins, physicians are often willing to state that a certain stress or strain was the triggering factor of a heart attack.⁴⁶ Even where claimants have a critical occlusion of a coronary artery, physicians have testified that a certain stress precipitated the heart attack.⁴⁷

Medical experts have been unable to determine what exactly triggers a myocardial infarction.⁴⁸ Therefore, the legislature and the courts should realize that medical testimony in this area has little value. If medical experts are unable to agree on the triggering factor of a heart attack, then an internist or general practitioner cannot accurately testify that a specific work-related stress or strain triggered the heart attack. There are a myriad of factors which can trigger a myocardial infarction and it is unrealistic for anyone to testify that a particular factor triggered a heart attack. This is especially true in cases involving the compensability of myocardial infarctions under worker's compensation statutes because the injury must be causally related to the work.

Because the Wyoming Legislature has required medical testimony under section 27-12-603(b), the testimony in this area must be closely scrutinized by the courts. Courts need the guidance that experts provide through their testimony, but the courts should also be careful not to overemphasize the substance of the physician's testimony.

LEGAL CAUSATION

The two most common standards of legal causation that have been developed by the courts and legislatures are the "usual exertion rule" and the "unusual exertion rule."⁴⁹ The usual exertion rule is nothing more than a restatement of the medical causation requirement that the worker must suffer an injury as a result of his usual work.⁵⁰ The unusual exertion rule requires the worker to perform more rigorous activities than his normal daily work activity. The unusual exertion rule is a more restrictive standard of legal causation adopted by a minority of states because the generalized nature of heart attacks makes them difficult to attribute to the work activity.⁵¹

44. *Kahn*, No. 84-44, slip op. at 4, (Wyo. Nov. 1, 1984).

45. Telephone interview with Terry Harris, Assistant Attorney General, Wyoming (March 7, 1985).

46. See *In re Vondra*, 448 P.2d 313 (Wyo. 1968); *Yost v. Wyoming State Treas. ex rel. Wyo. Worker's Comp. Div.*, 645 P.2d 137 (Wyo. 1982).

47. *Vondra*, 448 P.2d at 315.

48. *Juge & Phillips*, *supra* note 3.

49. 2 A. LARSON, *supra* note 6, § 38.30, at 7-48.

50. *Id.*

51. *Id.* The unusual exertion rule was originally used in other jurisdictions to determine the accidental quality of an injury. Since that time it has taken on importance by itself. Several jurisdictions, including Wyoming, have adopted the unusual exertion rule as a requirement for legal causation. The rule is not used to establish the accidental nature of the

The unusual exertion rule attempts to identify the cause of the heart attack by determining which of two variables change: the ability of the heart to function or the work. The Indiana Supreme Court stated the issue clearly in *United States Steel Corporation v. Dykes*.⁵² "Was the inability of decedent's heart to meet the demands [due to] . . . an increase in the workload beyond the heart's ability to function . . . or . . . a decrease in the heart's ability to meet an unchanged demand? The 'cause' is that which has changed, not that which remains constant."⁵³

The unusual exertion rule has been criticized for being unfair and generally unrelated to causation.⁵⁴ A usual exertion for one worker may be unusual exertion for another worker. For example, suppose it is usual for Worker 1 to lift heavy items and participate in heavy physical labor in the course of his employment while it is unusual for Worker 2 to engage in such activity. It is unfair to compensate Worker 2 for the lesser exertion which, while unusual to him, is not unusual to Worker 1. This is especially true where Worker 1's usual exertion is capable of causing the heart attack. The above example illustrates that the unusual exertion rule is not always a true indication of the cause of the heart attack.

The unusual exertion rule requires a standard to determine when a specific exertion was "unusual." There are two basic methods of measuring unusual activity: the objective test, which compares the work of the employee to the usual work of other employees engaged in the same or similar activity, and the subjective test, which compares the work of the employee to the employee's own usual work.⁵⁵

The Wyoming Legislature adopted the unusual exertion rule for heart attack cases in 1969.⁵⁶ As it was originally enacted, the Wyoming statute required the employee to show the causative exertion occurred "during the actual period of employment stress clearly unusual to, or abnormal for, the individual employee, in that particular employment."⁵⁷ The purpose behind adopting the unusual exertion rule was to limit the number of workers receiving compensation.

In the Wyoming Supreme Court's first opportunity to interpret the 1969 statute, the court adopted the subjective test in ruling that the exertion only had to be unusual to the injured employee.⁵⁸ The court's adoption of the subjective test appears to be consistent with the legislature's original wording of legal causation. However, in 1977 the legislature

injury but is used as a separate statutory requirement for compensation. See Comment, *Heart Injuries Under Workers' Compensation: Medical and Legal Considerations*, 14 SUFFOLK L. REV. 1365, 1390-91 (1980).

52. 238 Ind. 599, 154 N.E.2d 111 (1958).

53. *Id.* at 607, 608, 154 N.E.2d at 116.

54. 2 A. LARSON, *supra* note 6, § 38.81, at 7-229 to 7-231.

55. *Hamilton v. Procon, Inc.*, 434 Pa. 90, 252 A.2d 601, 605 (1969). See also Larson, *The Heart Cases in Workmen's Compensation: an Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 462 (1966).

56. 1969 Wyo. Sess. Laws ch. 200, § 15.

57. *Id.*

58. *Mor v. Haverlock*, 566 P.2d 219 (Wyo. 1977).

amended the unusual exertion rule and adopted an objective test which reads in relevant part: "stress clearly unusual to or abnormal for, *employees in that particular employment.*"⁵⁹ The court has ignored the legislative amendment and continues to apply the original subjective test.⁶⁰ In further disregard of legislative intent to restrict compensation, the court used the subjective test as the basis for establishing a less restrictive standard of legal causation for victims of previous heart attacks and thereby expanded the class of beneficiaries under the Act.⁶¹

To fully comprehend the history of legal causation under section 27-12-603(b), it is important to recognize the significant change in the law resulting from the adoption of the unusual exertion rule. Originally the Wyoming Worker's Compensation Act did not provide for "special treatment" when the worker's injury was a heart attack. Heart injuries were treated the same as all other injuries. All that was required was a showing that there was a causal connection between the heart injury and the work.⁶²

In *In re Vondra*,⁶³ the Wyoming Supreme Court discussed the debate surrounding compensability of heart attacks under worker's compensation acts in other jurisdictions. The court distinguished heart attacks from more traditional forms of work-related injuries. It noted the almost universal presence in the human body of heart problems at some stage of life.⁶⁴ The court also recognized that an important degree of atherosclerosis of the coronary arteries is present in approximately half of all American males over the age of forty-five.⁶⁵ The *Vondra* court also noted the difficulties of the medical profession in ascertaining with certainty the triggering mechanism of a particular attack.⁶⁶

The *Vondra* court applied the usual exertion rule because it appeared more consistent with the Wyoming worker's compensation rationale.⁶⁷ The court did not feel it could adopt the unusual exertion rule without a direct legislative mandate because the unusual exertion rule would place heart attacks in a special category. The court ended its opinion in *Vondra* by inviting the legislature to clarify the status of heart injuries in worker's compensation.⁶⁸

59. 1977 Wyo. Sess. Laws ch. 142.

60. Wyoming State Treas. *ex rel.* Wyo. Worker's Comp. Div. v. Schwilke, 649 P.2d 218 (Wyo. 1982). The court may not have known of this legislative amendment because no attorneys had brought the matter to the court's attention. As of this writing, the fact that the statute was amended has still not been pointed out to the court.

61. *Id.*

62. *In re Vondra*, 448 P.2d 313 (Wyo. 1968). See also *In re Hill*, 451 P.2d 794 (Wyo. 1969); *In re Brannan*, 455 P.2d 241 (Wyo. 1969).

63. *Vondra*, 448 P.2d at 313.

64. *Id.* at 315.

65. *Id.* at 316.

66. *Id.* at 315.

67. *Id.* at 318.

68. *Id.*

The *Vondra* opinion, with its invitation to the legislature, was issued on December 13, 1968.⁶⁹ The Fortieth Wyoming Legislature convened on January 14, 1969 and adopted the Wyoming Occupational Disease Law.⁷⁰ The section under cardiac conditions clearly sets forth the unusual exertion rule.⁷¹ The legislature's acceptance of the unusual exertion rule effectively raised the burden of proving legal causation. In addition, the language the Wyoming Legislature originally used in the 1969 Act, "unusual to . . . the individual employee, in that particular employment," indicates an acceptance of the subjective test.⁷²

The Wyoming Supreme Court's distaste for the unusual exertion rule was shown in its first opportunity to interpret it. In *Mor v. Haverlock*,⁷³ Justice Rose began his opinion by acknowledging the legislature's adoption of the rule and then stated: "Regardless of the wisdom of the rule, it must be applied to situations like that with which we are confronted here."⁷⁴ In *Mor*, the court discussed the effect of the unusual exertion rule on the burden of proof. "To sustain his burden of proof, as to the legal causation, the statute requires that the employee show that the causative exertion was clearly something beyond his normal routine—something more than the worker's usual work."⁷⁵ The court made it clear that the Wyoming Legislature had adopted the subjective test for measuring unusual exertion: "It should be emphasized, however, that the exertion in question must only be unusual to the employee—it need not necessarily be unusual to others engaged in the same employment."⁷⁶

In 1977, when the *Mor* case was under consideration, the legislature amended the legal causation requirements for coronary conditions under the worker's compensation statute.⁷⁷ The words, "the individual employee, in that particular employment" were changed to "employees in that particular employment."⁷⁸ This change indicated that the subjective test was replaced by the objective test.⁷⁹

69. *Id.* at 313, 318.

70. The heart statute was originally part of the Occupational Disease Law and not the Worker's Compensation Act. This is significant because the unusual exertion rule was intended to burden the legal causation requirements and not to measure traditional worker's compensation theories as the rule was used in other jurisdictions. Therefore it is impractical to determine Wyoming law based on other jurisdictions' interpretation of the unusual exertion rule. See *Yost v. Wyoming State Treas. ex rel. Wyo. Worker's Comp. Div.*, 654 P.2d 137 (Wyo.1982) (Rooney, J., dissenting).

71. 1969 Wyo. Sess. Laws ch. 200, § 15.

72. *Id.*

73. 566 P.2d 219 (Wyo. 1977).

74. *Id.* at 222.

75. *Id.*

76. *Id.*

77. 1977 Wyo. Sess. Laws ch. 142, § 27-361.

78. *Id.*

79. In 1969 the Pennsylvania Legislature did just the opposite. Prior to 1969, Pennsylvania law required proof that the work effort was unusual to the claimant's occupation. See, e.g., *Billick v. Republic Steel Corp.*, 214 Pa. Super. 267 257 A.2d 589 (1969); *McGowan v. Upper Darby Pet Supply*, 207 Pa. Super. 329, 217 A.2d 846 (1966). In 1969, the Pennsylvania Supreme Court replaced the objective standard with a subjective one in the case of *Hamilton v. Procon, Inc.*, 434 Pa. 90, 252 A.2d 601 (1969).

In the 1979 case of *State ex rel. Wyoming Worker's Compensation Division v. McCarley*,⁸⁰ Justice Rose clearly acknowledged the objective test contained in the amended statute. Justice Rose stated that one of the requirements of section 27-12-603(b) is that "[t]he claimant must establish a period of employment stress unusual or abnormal for employees in claimant's occupations."⁸¹ In using the objective test, the court appeared to recognize the legislative amendment and correctly abandoned the subjective analysis developed in *Mor*.⁸²

However, in *Wyoming State Treasurer ex. rel. Wyoming Worker's Compensation Division v. Schwilke*,⁸³ the court readopted the subjective test and used it as the basis for its holding. The worker, Schwilke, had experienced heart trouble the night before his death. The next day Schwilke performed jobs which were within his normal daily routine and then died of a severe heart attack.⁸⁴ A unanimous court, speaking through Chief Justice Rose, held that the legal causation requirement was satisfied because normal activity can become unusual after the worker has previously experienced heart attack symptoms. "[W]e are of the opinion that the circumstances of this case establish that the stressful work condition was unusual to or abnormal for the deceased's employment."⁸⁵

The court found the basis for legal causation in *Schwilke* by using the subjective test of the unusual exertion rule established in *Mor*.

Notwithstanding the fact that the actual physical exertion performed by Mr. Schwilke was within the realm of his normal activity, the record reflects that prior to the performance of these tasks he had experienced heart trouble. Under such circumstances, the once normal activity of his workday indeed became very unusual and abnormal for Mr. Schwilke. Under *Mor v. Haverlock* this is all that need be proven.⁸⁶

When the *Schwilke* decision is examined in light of the original legislative intent of the unusual exertion rule, it becomes apparent the court has expanded compensation beyond the limits the legislature contemplated. Legal causation examines the worker's exertion, not the worker's physical health. The court relied on the previous subjective test to reach the desired result when it was clear that the statute required the objective test. Using the objective test, Schwilke would have had to show that the exertion was unusual compared to other employees in his line of work. It is clear Schwilke did not fulfill this requirement and should not have been compensated.⁸⁷

80. 590 P.2d 1333 (Wyo. 1979).

81. *Id.* at 1335.

82. This case was decided on medical causation grounds and therefore the legal causation analysis is merely dictum.

83. 649 P.2d 218 (Wyo. 1982).

84. *Id.* at 219.

85. *Id.* at 222.

86. *Id.*

87. The record does not contain any evidence that Schwilke's work was unusual on the day of his death. *Id.*

In *Yost v. Wyoming State Treasurer ex rel. Wyoming Worker's Compensation Division*,⁸⁸ the court affirmed the *Schwilke* decision. The facts in *Yost* demonstrate just how far the court is willing to go to find legal causation. In *Yost*, medical testimony indicated that Yost suffered a heart attack anywhere from two days to two weeks prior to his death. The precise time or place of this first attack was not known. On the day of his death, Yost did not even perform his normal truck driving activities because before he died he sat around for thirty to forty-five minutes waiting for a tractor to push his truck out of the unloading pit. The court found that Yost, after being at work for two hours and performing his normal work activity for one hour, had employment stress clearly unusual to, or abnormal for, employees in that particular employment.⁸⁹ The *Yost* court cited *Schwilke* for the proposition that it is unusual stress for a worker suffering symptoms from a previous heart attack to continue to exert himself.⁹⁰

The case law on heart attacks since the enactment of section 27-12-603(b) was summarized in *Creek v. Town of Hulett*.⁹¹ The Wyoming Supreme Court affirmed the district court's decision denying compensation to a police officer dying of a heart attack resulting from his work. The court noted that only a factual question was presented and examined the lower court's decision with a high degree of deference.⁹² The court discussed its previous holdings in this area and examined the two factual situations which exist under Wyoming's unusual exertion rule.⁹³ First, the court identified those situations in which the actual work activities were different in kind or greater in degree than those normally required of the employee. The court then noted a second category. This category involved work activities which the court determined were unusual or abnormal exertion by virtue of the condition of the workman.⁹⁴ The court summarized by stating: "The thrust of our application of the unusual exertion rule leads to the conclusion that the award of worker's compensation benefits results because at the time of the critical event *the employee was different as compared to his prior and usual condition.*"⁹⁵

The two categories outlined in *Creek* clarify the court's position concerning legal causation for heart attacks in Wyoming. The determinative question is whether the worker has previously experienced heart trouble. A healthy worker must show that his heart attack resulted from an unusual exertion. A worker suffering from pre-existing heart disease only has to show some job-related exertion, or in essence only has to satisfy the usual exertion rule. With this standard, the court has deviated from

88. 654 P.2d 137 (Wyo. 1982).

89. *Id.* at 138-39.

90. *Id.* at 140.

91. 657 P.2d 353 (Wyo. 1983).

92. *Id.* at 354-57.

93. *Id.* at 356.

94. *Id.*

95. *Id.*

determining causation, because the job-related exertion is more likely the cause of the heart attack in a healthy worker than the worker suffering from pre-existing heart disease.

The new class of beneficiaries created by the court under the statute tends to further cloud an already ambiguous unusual exertion rule. The ruling by the court that even usual exertion can become unusual⁹⁶ makes the tenuous causal connection between the work effort and the cardiac attack even more questionable. The result is arbitrary because one worker is compensated for usual exertion whereas another worker can only receive compensation if he establishes an unusual exertion.

The court has also disregarded the legislative intent of the statute by using case law from other jurisdictions whose statutory requirements are different.⁹⁷ In *Schwilke*, the court stated: "[O]ther courts have also taken a similar stance—namely, that a normal activity can become unusual after the individual has previously experienced heart attack symptoms."⁹⁸ The Wyoming Supreme Court cited authority from Alaska, Kansas, and New Jersey.⁹⁹

An examination of these cases from other jurisdictions reveals that these cases are not good authority for the proposition that normal activity can become unusual. None of the three jurisdictions relied upon by the Wyoming Supreme Court attempted to determine whether a normal activity can become unusual because none of the jurisdictions had adopted the unusual exertion rule.¹⁰⁰

A WORKABLE STANDARD

Heart attacks are a lifestyle disease which develop over a period of years.¹⁰¹ The generalized nature of the disease makes it difficult to fac-

96. *Schwilke*, 649 P.2d at 222.

97. In *Creek*, the court stated, "we emphasize that in examining such situations we look at the activities which are usual for the particular employee, and note that this is the rule in other jurisdictions which have adopted the unusual exertion rule even though the statutory requirements are different." 657 P.2d at 356.

98. 649 P.2d at 223.

99. *Id.* citing Thornton v. Alaska Workmen's Comp. Bd., 411 P.2d 209 (Alaska 1966); Hanna v. Post and Brown Well Service, 199 Kan. 757, 433 P.2d 356 (1967); Aladits v. Simmonds Co., 47 N.J. 115, 219 A.2d 517 (1966).

100. All three of these jurisdictions followed the usual exertion rule. See *Yost v. Wyoming State Treas. ex rel. Wyo. Worker's Comp. Div.*, 654 P.2d 137, 144 (Wyo. 1982) (Rooney, J., dissenting). As the Kansas court stated, "if a workman's existing physical condition, whatever it may be, gives way under the stress of his usual labor, his death is an accident which arises out of his employment." Hanna v. Post and Brown Well Service, 199 Kan. 757, 766, 433 P.2d 356, 362 (1967). See 1B A. LARSON, *supra* note 6, § 38.64(c), at 7-193 to 7-199. There are three situations in which courts compensate a worker for a heart injury when the worker has continued exertion after feeling the symptoms of a heart attack. First, when the statute requires an accident in order to compensate the worker. The Wyoming statute does not require an accident. Second, when the statute uses a subjective approach to examine the worker's efforts. The Wyoming statute requires an objective approach. Third, if the employer insists on continuation of work after an injury and the statutes from the first and second examples are present. In *Schwilke* and *Yost*, there was no evidence that the employer insisted that the work continue and the statutory requirements were not applicable.

101. See *supra* text accompanying notes 14-32.

tually attribute the attack to the work. The practical considerations require establishing "artificial boundaries" so that heart cases will not become compensable whenever they take place even where work-connection is questionable. The Worker's Compensation Act is not intended to provide general life and health insurance for employees.

To guide the legislature in future attempts at enacting a new "heart attack statute," we suggest the following as workable standards for dealing with heart attacks under the Wyoming Worker's Compensation Act.¹⁰²

Alternative 1

Wyoming should abolish the section of the Worker's Compensation Act dealing with coronary conditions.¹⁰³ The causal relationship between the work effort and the heart attack is minimal at best.¹⁰⁴ However, there is a strong causal relationship between an employee's lifestyle and coronary artery disease. The real cause of heart attacks is the underlying coronary artery disease.¹⁰⁵ In many cases, the employee will eventually have a heart attack no matter what kind of work he performed. For this reason, cardiac conditions should not be compensable under worker's compensation systems.

Abolishing compensation for heart injuries under worker's compensation is not a harsh alternative when considering the compromise between the worker and the employer. Worker compensation laws were enacted to provide employees speedy relief for work-related injuries regardless of

102. The two suggested alternatives are not intended to be an exhaustive review of solutions for compensating heart injuries under worker's compensation. The legislature should also consider the following:

Waiver - A waiver agreement would allow a worker to relinquish his right to compensation for any subsequent injury to his pre-existing heart condition.

Second Injury Fund - These funds are common in the United States but do not generally cover heart injuries. Under this system the employer compensates the worker for that portion of the disability occurring because of the work-related injury. The second injury fund pays the difference between the employer's portion and the total benefits payable to the worker.

Apportionment - Apportionment statutes are similar to second injury funds in that the employer is liable only for the degree of disability resulting from the work-related injury. See Comment, *Problems and Suggested Solutions to the Cardiovascular Cases in the Workmen's Compensation Field*, 6 WILL. L.J. 95 (1970).

103. In Wyoming, the employer must take the worker as he finds him. For example, even if the worker is injured because of a pre-existing condition, the employer must compensate the employee. See *Exploration Drilling Co. v. Guthrie*, 370 P.2d 362 (Wyo. 1962). The legislature should statutorily abolish this rule as it presently applies to cardiac conditions.

If a worker who suffers a heart attack at work is found to have a critical occlusion of a major coronary artery, the legislature should provide that the injury is not compensable. The real cause of the injury is the underlying coronary artery disease and not the work effort. See *Lindbloom v. Teton Int'l*, 684 P.2d 1388 (Wyo. 1984). To require the employer to take a heart attack claimant as he finds him would require the employer, and the Wyoming Worker's Compensation Division, to become health insurers.

104. *In re Vondra*, 448 P.2d 313, 317 (Wyo. 1968)

105. See Comment, *supra* note 1, at 554, citing Hellmuth & Helmuth, *Heart Attack and Workmen's Compensation: Model Rules of Practice*, 4 FORUM 113, (1969). "It is widely agreed medically that no single event, no matter how great a strain, can cause an heart attack on a healthy heart and there is no evidence to indicate that coronary heart disease is ever etiologically related to employment." *Id.*

the lack of fault on the part of the employer and without the cost of an extended legal battle. In return for these benefits, the employee gave up the right to sue his employer for any employer negligence resulting in injury to the worker.¹⁰⁶ In essence, the worker gave up his right to sue the employer and sacrificed his right to obtain a large judgment for the right to obtain speedy relief for work-related injuries.

It is hard to imagine how an employee who suffered a heart attack could sue his employer for negligent acts resulting in injury to the worker. Ordering a worker to do strenuous work which resulted in a heart injury would not constitute negligence. The employer would have no knowledge of any underlying coronary artery disease giving rise to the heart attack. The proximate cause of the worker's injury is not the employer's actions, but is the worker's underlying heart disease. When the Wyoming Legislature enacted a statute compensating workers for heart injuries it created a windfall for the workers. Withdrawing that windfall is not inequitable.

Alternative 2

If the Wyoming Legislature does not wish to statutorily abolish heart attack compensation, the legislature must be careful in enacting a new law to avoid new problems. Also, the courts must be careful in applying the statute to avoid the problems discussed above.

A legal causation standard must be used to distinguish between those heart attacks resulting from work and those heart attacks resulting from a progressively deteriorating coronary condition. The solution can be found in a two part analysis which encompasses a minimum health requirement and an objective exertion requirement in the employment.

The first part of the analysis is the substantial health deterioration test, which denies compensation where the worker's health has deteriorated so that any normal daily activity is an over-exertion.¹⁰⁷ By examining a worker's health, a court will be examining objective factors which require less legal analysis and litigation. Factors which a court should consider are: 1) the percentage of occlusion in the artery leading to the damaged area of the heart, and 2) risk factors such as smoking, hypertension, diabetes, cholesterol level, heredity, and other known medical causes of heart attacks.¹⁰⁸

The second part of the analysis determines whether the worker's exertion was the actual cause of the heart attack. The injury must *arise out of and in the course of* the employment.¹⁰⁹ To meet this legal causation requirement, the worker's exertion must be greater than a normal non-

106. See *supra* text accompanying notes 6-13.

107. *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 370 N.E.2d 520 (1977).

108. See *supra* text accompanying notes 14-35.

109. The "arising" test is the basic requirement in most worker's compensation laws. It provides the causal nexus between the injury and the employment. Courts apply the "arising" test to distinguish those heart injuries attributable to the natural progression of the

employment life exertion.¹¹⁰ The worker's activity must present a greater strain than a strain to which the general public would be exposed.¹¹¹ This test measures the non-employment exertion of the general public and not the non-employment exertion of the particular worker suffering the heart attack.¹¹²

This proposed statute places a substantial financial burden on the employer in order to promote responsible actions in the workplace.¹¹³ The employer is in a good position to identify worker's with risk factors. By educating workers on the benefits of modifying risk factors and by controlling the workplace to reduce the risk factors the employer can promote safety and reduce the chance of heart disease. The cost of these programs will be balanced by the reduction in the payment of disability payments, litigation expenses and training new personnel to replace heart injury victims.¹¹⁴ The legislature should encourage this type of activity by placing a portion of the financial burden on employers.

CONCLUSION

One aspect of cardiovascular compensation in Wyoming is clear; the Wyoming Legislature must act to correct both its original error in enacting section 27-12-603(b) and the Wyoming Supreme Court's faulty interpretation of the ambiguous unusual exertion rule. In order for a worker's compensation system to function properly, only work-related injuries must be compensated. The Wyoming Legislature and the Wyoming Supreme

disease from those in which the employment was a contributing factor. See Comment, *supra* note 51, at 1380.

Ironically, worker's compensation laws and specifically the "arising" test, were intended to reduce court delays, to reduce costs and work loads arising from litigation, and eliminate fee payments to lawyers and witnesses. See *City and County of San Francisco v. Worker's Comp. Appeals Bd.*, 583 P.2d 151, 155 n.4 (1978).

110. *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 370 N.E.2d 520 (1977). See 1A A. LARSON, *supra* note 6, § 38.83. Dean Larson developed a similar test to determine causation on the basis of employment risk and personal risk. Under Larson's rule, the standard for compensation would depend on whether there was a history of heart disease. A worker with a pre-existing heart condition contributes a personal element of risk to the employment situation. With a personal risk element involved, the employment must contribute something substantial to offset the causal contribution of the personal risk. Larson proposed that a worker only be compensated for a heart attack if the employment contribution takes the form of an exertion greater than that of non-employment life. On the other hand, a worker without any prior history of heart problems, and therefore not contributing a personal risk would be compensated for any injury connected with the employment.

The personal risk test has been criticized because it is difficult to establish the amount of stress and exertion present in normal non-employment life.

111. *County of Cook*, 69 Ill. 2d 10, 370 N.E.2d 520 (1977).

112. *Id.*

113. For a similar line of reasoning see Spencer, *The Developing Notion of Employer Responsibility for their Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination under Federal and State Employment Statutes and Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659 (1979).

114. The American Heart Association estimated the total yearly cost of cardiovascular diseases to be 72.1 billion dollars, with thirteen billion dollars as a result of lost output due to disability. AMERICAN HEART ASSOCIATION, HEART FACTS (1985).

Court have strayed from this basic premise. Worker's compensation is not general life and health insurance and the standards for compensating heart injuries must be changed.

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