Montana Law Review

Volume 27
Issue 2 *Spring 1966*

Article 5

January 1966

James v. V.K.V. Lumber Co., 145 Mont. 466, 401 P.2d 282 (1965)

William W. Wertz

RECENT DECISIONS

WORKMEN'S COMPENSATION: BACK INJURY INCURRED IN THE NORMAL COURSE OF EMPLOYMENT IS NOT AN INDUSTRIAL ACCIDENT.—In 1964, claimant suffered a "lumbrosacral strain" while working at employment covered by the Montana Workmen's Compensation Act. Claimant, a lumber stacker, incurred the back injury when he bent over to pick up a block of wood. His claim for benefits was denied by the Industrial Accident Board, but the district court reversed that holding. On appeal by the Board to the Montana Supreme Court, *held,* reversed. The claimant failed to establish an "industrial accident" under the "industrial injury" statute[1] which requires a tangible happening of a traumatic nature from an unexpected cause. *James v. V. K. V. Lumber Co.,* 145 Mont. 466, 401 P.2d 282 (1965).

Whether an injury resulting from strain is compensable under workmen's compensation law has been the source of much litigation. This problem has not been confined to courts of this country, but has arisen in England where compensation acts originated.[2] Since strain[3] is internal and the symptoms largely subjective, it is often difficult to determine whether there is any connection between the strain and the employment. The solution to this problem is based on the interpretation each state gives to the word "accident".[4]

Historically "accident" has been given liberal construction. Because English compensation acts provided the stimulus for such legislation in the U. S., the English interpretation of "accident" is significant. Lord McNaughton defined the term as "an unlooked for mishap or an untoward event which is not expected or designed."[5] Another English jurist has stated that an "accident" is to be construed "in the popular sense as plain people would understand it."[6] After pointing to a variety of meanings he declared: "In short, the common meaning of this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage in all cases." The English courts have consistently held that an employee sustains an injury "by accident" if either the cause or the result is unexpected, unforeseen, or unintentional.[7]

A very substantial majority of courts of this country have adopted

[1]REVISED CODES OF MONTANA, 1947, § 92-418. (Hereafter REVISED CODES OF MONTANA will be cited R.C.M..)

[2]1 LARSON, WORKMEN'S COMPENSATION LAW § 37.20, at 512 (1961).

[3]Strain—"An overstretching or overexertion of some part of the musculature," to an extreme or harmful degree. DORLAND, ILLUSTRATED MEDICAL DICTIONARY (23d ed. 1957).

[4]The terms "accidental injury" or "injury by accident" appear in most compensation acts. 1 LARSON, *op. cit. supra* note 2, at 512-13.

[5]Fenton v. Thorley & Co., Ltd., [1903] A. C. 443.

[6]Trim Joint School v. Kelly [1914] A. C. 667, 680-81 (Loreburn, L., concurring).

[7]*Fenton v. Thorley Co. Ltd., supra* note 5; Clover, Clayton, & Co., Ltd., v. Hughes [1910] A. C. 242.

the English rule.[8] This majority holds that an injury is accidental where either the cause or result is unexpected or accidental, although the work being done is usual and ordinary.[9] It is generally recognized that the unexpected, unusual, or undesigned event or occurrence which is essential to constitute an accident may be either exertion or the consequence of exertion.[10]

Many states allow compensation for a disabling back injury, such as a strain, although the injury or strain does not result from unusual force or exertion.[11] The rationale of this majority position exemplifies the theory underlying workmen's compensation.[12] Since the benefit is directly for employees and only indirectly for society, workmen's compensation acts should be construed liberally in favor of the employee.[13]

A minority of jurisdictions allow compensation only when the resulting injury is a consequence of unusual, excessive strain or exertion.[14] However, this minority allows compensation if the ordinary exertion of the workman is accompanied by a muscular strain or twist which causes a change in the structure or tissues of the body.[15]

The Montana Supreme Court in the instant case was faced with the problem of construing the statutory definition of injury. This involved consideration of the "industrial injury"[16] concept under the old and new statutes.[17] The concept of "industrial injury" as used in the Montana Workmen's Compensation Act has been subjected to much judicial interpretation by the Montana Supreme Court. Prior to 1961, Montana fol-

[8]SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1446 (Supp. 1959).

[9]99 C. J. S. *Workmen's Compensation* § 182 (1958).

[10]*Id.* at 613 n. 29, "an injury arising from a strain caused by lifting, pulling, prying or shoveling . . . constitutes an accidental injury." The requirement that the injury be accidental has been adopted legislatively or judicially by all but four states (California, Iowa, Massachusetts and Rhode Island). Thirty-two states use "by accident". Seven states use the phrase "accidental injury". (Arkansas, Connecticut, Illinois, Maryland, Mississippi, New York and Oklahoma). In four states, the basic coverage clause contains no such requirement, but reference to the word "accident" is made elsewhere in the statute. The courts of these states have read "accidental" into the coverage statute. Ohio has no reference to "accident" anywhere in the statute but the courts have read the requirement in anyway. Two states, Montana and Washington, have adopted their own definitions. 1 LARSON, *op. cit. supra* note 2 § 37.10.

[11]99 C. J. S. *Workmen's Compensation* § 183 (1958); 1 LARSON, *op. cit. supra* note 2, § 38.30.

[12]To accomplish this end the economic burden is placed upon industry (and ultimately the consumers) rather than upon the workers and their dependents who might otherwise become wards of the state. Horowitz, *Current Trends in Basic Principles of Workmen's Compensation,* 12 L. SOC'Y J., 466, 470-71 (1947).

[13]*Ibid.*

[14]99 C. J. S. *Workmen's Compensation* § 182 (1958).

[15]*Ibid.*

[16]The "industrial injury" or "accidental injury" concept is used by Montana courts in discussing "accident". "Industrial accident" is synonymous with "injury by accident" as conceived by other jurisdictions. 1 LARSON, *op. cit. supra* note 2, § 37.00.

[17]Laws of Montana 1915, ch. 96, § 6 read: "Injury or injured defined. 'Injury' or 'Injured' refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of a disease." As amended, Laws of Montana 1961, ch. 162, § 6, the statute, *supra* note 1, reads: "'Injury' or 'Injured' means a tangible happening of a traumatic nature from an unexpected cause, resulting in either external or internal physical harm, and such physical condition as a result therefrom, and excluding disease not traceable to injury."

lowed the majority rule. The earlier decisions demonstrated the court's willingness to construe the Act liberally in favor of the claimant to accomplish its beneficent and remedial purposes.[18] The court has termed "industrial accidents" such injuries as heart failure,[19] heat prostration,[20] neurosis,[21] and back strain.[22] All these cases were decided before the 1961 amendment which redefined the term "injury".[23]

Under the old act the decisions interpreted "injury resulting from a fortuitous event" as equivalent to the "injury by accident" language used by the majority of jurisdictions.[24] Therefore, the decisions incorporated the majority rule that there was an injury "by accident" if either the cause or result was unexpected. The decisions were liberal but they were within the spirit of the Workmen's Compensation Act.

Three significant decisions appear to have precipitated the 1961 amendment to the injury statute. The first decision, *Rathbun v. Taber Tank Lines*,[25] held that a truck driver who had died of a heart attack while driving a truck had suffered an "industrial accident". The court reasoned that driving long hours without sleep was sufficient undue strain or exertion to aggravate a pre-existing disease.[26] The second decision, *Murphy v. The Anaconda Co.*,[27] allowed recovery for an employee's heart attack sustained while pushing a mail cart. The court ruled "that an unexpected injury received in the ordinary performance of a duty in the usual manner is an injury by accident."[28] These cases aligned Montana with the majority of jurisdictions not requiring an "unusual strain" in heart attack cases.

Hines v. Industrial Accident Board[29] provided the final impetus for legislative action. The court held that contraction of polio was a compensable injury. Ignoring the provisions of the relatively explicit statute, the court in *Hines* appeared to adopt the district court's finding that a "fortuitous event" is not necessary for a compensable injury.[30] In so finding the district court relied on the *Murphy* case from which it extracted an incomplete and misleading statement that "an injury is accidental when either the cause or the result is unexpected."[31] The court

[18]R.C.M. 1947, § 92-838.

[19]Rathbun v. Taber Tank Lines, Inc., 129 Mont. 121, 283 P.2d 966 (1955); Murphy v. Anaconda Co., 133 Mont. 198, 321 P.2d 1094 (1958); Young v. Liberty Nat'l Ins. Co., 138 Mont. 458, 357 P.2d 886 (1960).

[20]Ryan v. Industrial Acc. Bd., 100 Mont. 143, 45 P.2d 775 (1935).

[21]Best v. London Guar. and Acc. Co., 100 Mont. 332, 47 P.2d 157 (1933).

[22]O'Neil v. Industrial Acc. Bd., 107 Mont. 176, 81 P.2d 688 (1938).

[23]*Supra* note 17.

[24]*Rathbun v. Taber Tank Lines, supra* note 19, at 130-31.

[25]*Ibid.*

[26]*Id.* at 132.

[27]*Supra* note 19.

[28]*Id.* at 211, 321 P.2d at 1101.

[29]138 Mont. 588, 358 P.2d 447 (1960). Mr. Justice Castles dissented in the *Hines* case. He correctly pointed out that the old statute specifically excluded "contraction of disease". The majority of the court did not mention this language.

[30]*Supra* note 29, at 591, 358 P.2d at 479.

[31]*Ibid.*

actually held in *Murphy* that "an injury is accidental where either the cause or the result is unexpected or accidental although the work being done is usual or ordinary *as long as the exertion is either the sole or a contributory cause of the injury.*"[32] (Emphasis added.) In short, *Murphy* held that the unexpected cause or result must be traceable to the employment, whereas *Hines* did not. It is submitted that the legislature enacted the amendment in direct response to these three decisions.[33]

The new statute requires an "unexpected cause." The *Lupien* case, decided after passage of the new statute, held that an employee's death caused by a heart attack which stemmed from a disease of the arteries did not meet the "unexpected cause" requirement.[34] The court interpreted the statute as requiring an "unusual strain" in heart attack cases. This interpretation aligns Montana with the minority of jurisdictions.[35] The court did recognize that "cardiac cases" might be compensable under different circumstances.[36] Mr. Justice Castles concluded that the intent of the legislature was to read "unexpected result" out of the new act.[37] It is submitted that the legislature's purpose was rather to exclude unexpected results not directly traceable to job injury. The result excluded by the statutory definition is the "pure" heart attack which occurs on the job by happenstance and does not stem from an "unexpected cause" or an unusual strain or exertion incurred in the course of employment.

The instant decision applies the *Lupien* interpretation of the amended injury statute. Justice Castles reasoned that, since both claimants in *Lupien* and the instant case were doing normal work when they sustained their injuries, there was not a sufficient showing of an "unexpected cause."[38] This conclusion is unsatisfactory. It is submitted that the court erred in applying the "unexpected cause" test of a cardiac case to a back injury case. There seem to be two possible constructions of "unexpected cause." The narrower construction would apply to heart attacks. The "unexpected cause" required to find a heart attack compensable demands something outside of the normal employment. For instance, if a clerk overstrains while lifting a desk, a subsequent heart attack would probably be compensable.

This restrictive test devised for heart attacks cannot logically be

[32] *Supra* note 19, at 211, 321 P.2d at 1101.

[33] An interview on March 22, 1966, with a member of the Senate Labor & Commerce committee which drafted the 1961 amendment, indicated the purpose was to read out heart attacks and diseases not traceable to injury. The Supreme Court seems to recognize the legislative intent to exclude disease not traceable to injury. In LaForest v. Safeway Stores, Inc., 23 St. Rptr. 357, ... P.2d .... (Mont. 1966), a supermarket clerk claimed compensation for an injury to her shoulder caused by lifting a box of groceries. The court held that the injury was actually caused by a preexisting bursitis condition which was not traceable to an on the job injury and thus not compensable. See also *Montana Legislative Summary: 1961*, 22 MONT. L. REV. 103, 135 (1961); and 22 MONT. L. REV. 195 (1961).

[34] Lupien v. Montana Record Publishing Co., 143 Mont. 415, 390 P.2d 455 (1964). Justice Castles wrote the majority opinion.

[35] *Supra* note 14.

[36] *Supra* note 34, at 421.

[37] *Ibid.*

[38] Instant case at 283.

applied to injuries to the musculoskeletal system. Merely bending over, in the ordinary course of employment could constitute the "unexpected cause" required of an injury to the body structure. Even the minority rule recognizes that, if an act done in the normal course of employment is accompanied by a muscular strain or twist, the disabling result may be compensable because there has been an unusual or excessive exertion.[39] The "unexpected cause" test of a heart attack when applied to injuries of the back, goes beyond the intent of the legislature.

An examination of Washington case law illustrates the distinction between the application of the new statute to heart attacks and to back injuries.[40] In *Windust v. Dept. of Labor & Industries*,[41] the Washington Supreme Court overruled prior cases by holding that a workman's fatal heart attack sustained while performing an ordinary phase of his job did not fit the statutory definition of injury. *Windust* laid down the rule that a heart attack would be a compensable injury only if it resulted from unusual strain or exertion. In *Boeing v. Fine*[42] the court refused to apply the "unusual strain" test used in heart attack cases to back injury litigation.[43] The court held that a clerk-typist suffered a compensable back injury when she bent over to answer the telephone. In *Boeing*, the court spoke approvingly of the *Windust* result, pointing out a heart attack suffered during accustomed exertion is really happenstance as to time and place.[44] However, it emphasized that there is a valid distinction between a heart attack and a back injury incurred in the normal course of employment:

> The fundamental differences between heart attacks and back injuries are such as to render the "unusual exertion" test irrelevant when transplanted into the area of law dealing with injuries to the skeletal structure of the body, in particular the back. . . . It is quite possible that a slight or usual strain applied at an unusually different angle could, through forces of levers, et cetera, overpower and injure a normal back. Thus, the *unusual strain* requirement of the Windust case does not apply to injuries to mechanical structures to which the angle of application of the force may be vastly more important than the general level of strain.[45]

A prima facie showing of unusual or awkward angle in bending while engaged in regular duties is necessary to entitle a claimant to re-

[39] *Supra* note 14.

[40] Washington and Montana are the only states with statutes defining an "industrial injury" or "accidental injury". 'Injury' or 'Injured' means a sudden tangible happening of a traumatic nature producing an immediate or prompt result occuring from without and such physical condition as results therefrom. Laws of Washington 1927, ch. 310. § 2, p. 815. This act was later re-enacted into the current statute. Laws of Washington 1961, ch. 23, § 51.08.100, p. 1299.

[41] 52 Wash. 2d 33, 323 P.2d 241 (1958).

[42] 65 Wash. Dec. 2d 149, 396 P.2d 145 (1964).

[43] *Id.* at 147. In *Boeing* the Washington court had to decide whether to *extend* the "unusual strain" or "unexpected cause" test imposed by a case in a particular situation, namely a heart attack. Montana's statute requires an "unexpected cause" in all cases, but the Washington case gives authority for the conclusion that an "unexpected cause" in a heart attack case and a back injury case are by no means the same.

[44] *Ibid.*

[45] *Ibid.*

cover for a back injury in Washington. To require a showing of an "unusual strain" as required in heart cases would place an insurmountable burden on workmen.[46] It is therefore submitted that the result of the *Boeing* case should have been reached in the instant case. The relationship of the *Boeing* case to the instant case is apparent. There the claimant, a typist, suffered a back injury while bending and twisting to lift a telephone.[47] In the instant case claimant, a lumber stacker, sustained a back injury while bending and twisting to lift a block of wood.[48] The instant decision, by applying the "unusual strain" test of cardiac cases, failed to reach a reasonable result. As the *Boeing* case pointed out: "An unthinking or automatic application of the heart rule to the mechanical structures of the body would be unreasonable, illogical, and unwise. Industry must bear the expense of injuries which are caused by the application of force to a mechanical bodily structure."[49]

The major purpose of workmen's compensation is to place the burden for work-injuries upon industry, rather than upon the individual worker, or public or private charity. Such legislation does not have the same function as commercial life insurance. It provides only that the worker shall recover for those injuries caused by his employment. This does not mean that the claimant should be subjected to unwarranted legal technicalities to prevent recovery for a justified claim. The doctrine set forth in the *Murphy* case, requiring liberal construction of the Workmen's Compensation Act, should be revived.[50] The intent of the legislature was to restrict recovery for heart failure and disease not arising out of employment. The language of the new statute is not so restrictive as to exclude back injuries sustained in the course of employment. Judicial fiat should not impose narrow limitations upon humanitarian legislation. The court must act affirmatively to correct this decision. The spirit of workmen's compensation will be lost if future Montana claimants are bound by the holding of the instant case.

WILLIAM W. WERTZ.

FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER A LEASE OF TRIBAL LAND TO A NON-INDIAN.—Petitioners were Canadian citizens and shareholders in co-petitioner, the St. Marys Lake Development Corporation. In 1962, the corporation executed a twenty five year lease[1] of Blackfeet tribal land. In 1964, a member of the Blackfeet Tribe filed a complaint and the defendant Blackfeet Tribal Court ordered the petitioners to

[46] *Ibid.*
[47] *Id.* at 146.
[48] Record, James v. V.K.V. Lumber, 401 P.2d 282 (1965), p.3.
[49] *Boeing v. Fine, supra* note 42, at 147.
[50] *Supra* note 19, at 1097; R.C.M. 1947, § 92-838.

[1] The lease was approved by the Secretary of Interior acting through the area director.