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Decision Holding Contraction of Polio Is Injury within Montana Workmen's Compensation Act Is Overturned by Legislature

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tween tax deed holders and other property owners to justify the shorter statute of limitations.

In the statute enacting a longer statute of limitations for those who have occupied the status of tenant there is much less reason to find the differential treatment arbitrary. The relation of landlord and tenant is a distinct, well-recognized one, neither new nor novel.[12] At common law a tenant could not set up a title against his landlord at all without first surrendering possession.[13] In the absence of a statute, the general rule today is that the possession of the tenant is not deemed adverse to the landlord, so as to enable the tenant to acquire title by adverse possession, unless there has been a clear repudiation of the holding under the landlord and notice of such repudiation is brought home to the landlord.[14] The Montana statute takes an intermediate position, dealing with the problem in the same way that California and New York have.[15] It would seem that the legislature intended to give recognition to the important character of the relation and to impede the claim of adverse possession by a tenant who has continued in possession. The relation of landlord and tenant is not a mere technical one, but implies a relation of trust and confidence which should not be abused.[16] The relation involves the relinquishment by the landlord of exclusive possession and control during the term, as distinguished from a mere privilege or license.[17]

The dictum in the instant case leaves the standing of the statute governing adverse possession by a tenant in serious question. The court will undoubtedly be called upon sometime to answer the question which it has posed. It is submitted that in view of the foregoing considerations the court should not conclude that section 93-2512 is unconstitutional. The classification it makes is based upon a sound traditional distinction.

ROBERT CORONTZOS

DECISION HOLDING CONTRACTION OF POLIO IS INJURY WITHIN MONTANA WORKMEN'S COMPENSATION ACT IS OVERTURNED BY LEGISLATURE—Decedent was employed as a foreman in the Helena city street department. He frequently worked and ate at the city shops, in close proximity to city garbage trucks and the hobo jungles. For three or four days prior to the onset of his illness he had been doing fatiguing work in the hot sun. Three days after he became ill, he died of bulbar polio. The Industrial Accident Board denied his widow compensation because she failed to show that de-

[12]Butler v. Maney, 146 Fla. 33, 200 So. 226 (1941).
[13]Tewksbury v. Magraff, 33 Cal. 237 (1867).
[14]51 C.J.S. *Landlord and Tenant* § 282 (1947).
[15]See CAL. CODE CIV. PROC. § 326; N.Y. CIV. PRAC. ACT § 41. Research has failed to disclose any cases questioning the constitutionality of the statute in these jurisdictions.
[16]Ballard v. Gilbert, 55 So. 2d 723 (Fla. 1951).
[17]Kayser Corp. v. Fosterport Realty Corp., 1 Misc. 2d 469, 69 N.Y.S.2d 313 (1947), *aff'd.* 272 App. Div. 878, 72 N.Y.S.2d 405 (1947).

cedent had sustained an injury arising out of and in the course of employment, resulting from some fortuitous event, as distinguished from the contraction of disease. The District Court reversed the order of the I.A.B. and awarded compensation. On appeal to the Montana Supreme Court, *held,* affirmed. Contraction of polio may be an injury within the contemplation of the Montana Workmen's Compensation Act. *Hines v. Industrial Accident Board,* 358 P.2d 447 (Mont. 1960) (Justice Castles and Chief Justice Harrison dissenting).

In upholding the award, the Montana Supreme Court was faced with two problems: first, whether the contraction of polio may be considered an industrial injury in the face of a statute which defines injury as "resulting from some *fortuitous event, as distinguished from the contraction of disease";*[1] and second, whether, in spite of the obscure etiology of polio, there can be established a sufficient causal connection between the employment and the disease. It should be noted at the outset that the two dissenting justices would have held both that the contraction of polio was not an industrial injury, and that there was no causal connection shown between the employment and the contraction of polio.

The concept "industrial injury" used in the Workmen's Compensation Act has been the subject of much judicial interpretation in the Montana Supreme Court. Since the Act is to be given liberal construction to accomplish its beneficent and remedial purposes,[2] the court's approach to the cases has been very individualized, resulting in no precise delimitation of the concept. The following have been termed "industrial injuries" in Montana: heart failure resulting from varying degrees of exertion;[3] a latent lung condition activated by inhalation of poisonous fumes;[4] heat prostration resulting from excessive exposure in the sun;[5] neurosis resulting from a fall from a seaffold;[6] from being hit by a piece of stone;[7] or from the strain of setting a post;[8] arthritic condition accelerated from being struck in the leg by a board;[9] Parkinson's disease accelerated by a fall;[10] or caused by back and hip injuries when struck by a packing case;[11] meningitis contracted after the claimant had suffered a fall;[12] and diseased kidneys listed as the cause of death after the workman had been almost killed three and one half years before when a mine ceiling caved in on him, and from which injuries he never fully recovered.[13]

It is well-settled, therefore, that there may be compensation for a disease if the disease has been aggravated or accelerated by an injury arising

[1]REVISED CODES OF MONTANA 1947, § 92-418.
[2]REVISED CODES OF MONTANA 1947, § 92-838.
[3]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., 357 P.2d 886 (Mont. 1960).
[4]Murphy v. Industrial Accident Board, 93 Mont. 1, 16 P.2d 705 (1932).
[5]Ryan v. Industrial Accident Board, 100 Mont. 143, 45 P.2d 775 (1935).
[6]Best v. London Guar. & Acc. Co., 100 Mont. 332, 47 P.2d 656 (1935).
[7]Sykes v. Republic Coal Co., 94 Mont. 239, 22 P.2d 157 (1933).
[8]O'Neil v. Industrial Accident Board, 107 Mont. 176, 81 P.2d 688 (1938).
[9]Birnie v. United States Gypsum Co., 134 Mont. 39, 328 P.2d 133 (1958).
[10]Gaffney v. Industrial Accident Board, 129 Mont. 394, 287 P.2d 256 (1955).
[11]Moffett v. Bozeman Canning Co., 95 Mont. 347, 26 P.2d 973 (1933).
[12]Williams v. Brownfield-Canty Co., 95 Mont. 364, 26 P.2d 980 (1933).

out of and in the course of employment,[14] and further that the employer takes the employee as is without any warranty as to his state of health.[15] However, it must be shown that the aggravation, and not the disease as it would otherwise affect the claimant, is a contributing cause of the disability.[16] This is far different from allowing recovery for the initial contraction of disease where no "injury" is involved within the meaning of the statutory language.

In determining that contraction of polio is an "industrial accident," the majority of the court relied upon this statement in another recent Montana case:[17]

> There can be an industrial accident within the meaning of the Workmen's Compensation Act even though there is no accident in the ordinary sense, *i.e.*, an act of violence whereby an employee is struck by an object or injured by a fall.

In that case the workman was exposed to severe cold plus physical exertion to the point of exhaustion, from which he developed arteriosclerosis. Other cases support the view that exposure or exertion are sufficiently fortuitous to constitute an industrial accident when it results in disability.[18] In the instant case the majority of the court notes that the decedent was doing fatiguing work in the hot sun, but it does not discuss whether or not it deems this a fortuitous event. Rather, it appears to adopt the district court's finding that the law does not require a fortuitous event.[19] In so holding, the district court relied upon *Murphy v. Anaconda Co.*,[20] from which it extracted an incomplete and misleading statement: "An injury is accidental when either the cause or result is unexpected."[21] In *Murphy v. Anaconda Co.* the supreme court actually held:[22]

> An injury is accidental where either the cause or 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.

The court was very careful in the *Murphy* case to define "fortuitous event" as a prerequisite to finding an industrial accident.[23] It is submitted that the district court fell into error by finding that the law does not require the injury to result from some fortuitous event.

In the instant case the majority does not even discuss the express

[13]Tweedie v. Industrial Accident Board, 101 Mont. 256, 53 P.2d 1145 (1936).
[14]Nicholson v. Roundup Coal Mining Co., 79 Mont. 358, 380, 257 Pac. 270, 276 (1927); 1 LARSON, WORKMEN'S COMPENSATION LAW § 12.20 (1952).
[15]Birdwell v. Three Forks Portland Cement Co., 98 Mont. 483, 497, 40 P.2d 43, 47 (1935); 1 HONNOLD, WORKMEN'S COMPENSATION § 98 (1918).
[16]Gaffney v. Industrial Accident Board, 129 Mont. 394, 404, 287 P.2d 256, 201 (1955).
[17]Young v. Liberty Nat'l Ins. Co., 357 P.2d 886, 891 (Mont. 1960).
[18]See, *e.g.*, Ryan v. Industrial Accident Board, 100 Mont. 143, 45 P.2d 775 (1935) (exposure); Rathbun v. Taber Tank Lines Inc., 129 Mont. 121, 283 P.2d 966 (1955) (exertion).
[19]Instant case at 449.
[20]133 Mont. 198, 321 P.2d 1094 (1958).
[21]Instant case at 449.
[22]133 Mont. 198, 211, 321 P.2d 1094, 1101 (1958) (emphasis supplied).
[23]*Id.* at 206, 321 P.2d at 1099.

statutory exclusion of contraction of disease from the Act, while Justice Castles, in his dissent, views the statutory language as directed at precisely such diseases as polio.

Having determined that the contraction of polio could be an industrial accident, the majority of the court agreed with the district court that the death of the claimant's husband was caused or contributed to by his employment.[24] The dissent disagreed with the majority on this point also.[25]

The trial court specifically found that "No one knows exactly when, where, how, or why a poliomyelitis victim contracts the disease."[26] It has been consistently held that the burden is upon the claimant to prove an injury resulting from (1) an industrial accident, (2) arising out of and (3) in the course of employment, and since these terms are used conjunctively and not disjunctively in the statute, all the essential elements must be proved by the claimant by a preponderance of the evidence.[27] A perusal of the record reveals that the best the claimant could show was a mere possibility that the decedent contracted the disease while on the job. Relying upon *Gaffney v. Industrial Accident Board,*[28] the trial court found a mere possibility all that is required,[29] and the majority seems to have acquiesced in that statement of the law. There is no question that this is an area of medical uncertainty and, to be sure, the law does not require demonstration or such a degree of proof as produces absolute certainty.[30] However, under the guise of liberal construction, the court should not lose sight of the proposition that the Act is not framed on the theory of life insurance for the employees, but on that of compensation for injuries sustained in the course of employment.[31] Perhaps the legislature had this area of scientific incertitude in mind when it distinguished injury from contraction of disease.

There have been only a few polio workmen's compensation cases from other jurisdictions, and those allowing recovery have all related to nurses who were exposed to polio patients in the course of their work.[32] Since none of these jurisdictions has a statutory definition of "injury" like that of Montana,[33] their holdings are of doubtful value as authority in this

[24]Instant case at 452.
[25]*Id.* at 454.
[26]*Id.* at 449.
[27]Nicholson v. Roundup Coal Mining Co., 79 Mont. 358, 374, 257 Pac. 270, 275 (1927).
[28]129 Mont. 394, 287 P.2d 256 (1955).
[29]Instant case at 449.
[30]Weakley v. Cook, 126 Mont. 332, 336, 249 P.2d 926, 928 (1952).
[31]Landeen v. Toole County Refining Co., 85 Mont. 41, 53, 277 Pac. 615, 619 (1929).
[32]Industrial Commission v. Corwin Hospital, 126 Colo. 358, 250 P.2d 135 (1952); Gardner v. New York Medical College, 280 App. Div. 844, 113 N.Y.S.2d 394 (1952), *affirmed*, 111 N.E.2d 644 (N.Y. 1953); Los Angeles County v. Industrial Accident Commission, 13 Cal. App. 2d 69, 56 P.2d 577 (1936); Wold v. Industrial Accident Commission, 42 Cal. App. 2d 512, 109 P.2d 398 (1941), *cert. denied*, 316 U.S. 650 (1942). For cases denying compensation see, *e.g.*, Children's Hospital Society v. Industrial Accident Commission, 22 Cal. App. 2d 365, 71 P.2d 83 (1937) (nurse who did not sustain the burden of proof); Travelers Ins. Co. v. Blazier, 228 S.W.2d 217 (Tex. Civ. App. 1954) (laborer); Standard Acc. Ins. Co. v. Nicholas, 146 F.2d 376 (5th Cir. 1944) (laborer). *Cf.* McAllister v. Cosmopolitan Shipping Co., 169 F.2d 4 (2d Cir. 1948).
[33]See REVISED CODES OF MONTANA 1947, § 92-418; N.Y. WORKMEN'S COMP. LAW § 2(7) (McKinney 1946) (injury means only accidental injuries arising out of and in the

state. Nonetheless the majority relied on a Colorado case as though it lent support to its position.

It would appear that the majority of the court has invaded the legislative domain in rendering this ultra-liberal decision. The only way the majority could have reached this result, since there can be no dispute that polio is a disease, was to ignore altogether the provisions of a relatively explicit statute. In addition it upheld a finding of causal relation upon showing of a mere possibility.

In direct response to the instant case the 1961 Session of the Montana Legislative Assembly amended R.C.M. 1947, § 92-418, to read as follows:[34]

> "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.* (Emphasis supplied).

This statutory declaration repudiates the instant case and narrows the sweep of the Act, possibly excluding both exposure and exertion cases from coverage. The liberal holding in the instant case, by precipitating this legislative reaction has in the final analysis diminished rather than expanded workmen's rights under the Act.

KENNETH R. WILSON

MONTANA CONSTITUTIONAL AMENDMENT REFERENDUM REQUIRES APPROVAL OF GOVERNOR BEFORE SUBMISSION TO ELECTORATE.—A proposed constitutional amendment, passed by the Montana Legislative Assembly, would have created a separate Board of Regents for the general control and supervision of the University of Montana. The proposal was not submitted to the governor for his approval. A proceeding was brought in the Supreme Court of Montana to restrain the secretary of state from expending public funds to publish the proposed amendment. A temporary restraining order issued. The Montana Supreme Court, after a hearing on the merits, made the injunction permanent. A proposed constitutional amendment must, under the Montana Constitution, be submitted to the governor for his approval or rejection before it is presented to the people. *State ex rel. Livingstone v. Murray,* 354 P.2d 552 (Mont. 1960) (Justice Angstman concurring specially).

Relator attacked the constitutionality of the proposed amendment on two grounds: first, that it contained two separate and distinct subjects

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course of employment and such disease or infection as may naturally result therefrom); COLO. REV. STAT. 1953, §§ 81-2-1 to -8 (no attempt to define injury); CAL. LAB. CODE ANN. § 3208 (Deering 1953) (injury includes any injury or disease arising out of employment).

[34] Laws of Montana 1961 ch. 162.