January 1982

Workers’ Compensation and Occupational Disease

Diane Barlow LaPlante  
*University of Montana School of Law*

Richard Opp  
*University of Montana School of Law*

Follow this and additional works at: [https://scholarship.law.umt.edu/mlr](https://scholarship.law.umt.edu/mlr)  
Part of the [Law Commons](https://scholarship.law.umt.edu/mlr)

**Recommended Citation**  
Available at: [https://scholarship.law.umt.edu/mlr/vol43/iss1/4](https://scholarship.law.umt.edu/mlr/vol43/iss1/4)

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
This is a two-part comment written by two authors illustrating the problems faced by Montana workers in obtaining compensation for work-related injury or disease. Montana's coverage for compensation is legislatively divided into two separate areas. Work-related injuries are compensated under the Workers' Compensation Act, and work-related diseases are compensated under the Occupational Disease Act. The problems in each area are similar and often overlap. Both authors suggest legislative revisions.

I. Workers' Compensation

A. Introduction

Workers' compensation laws provide benefits to workers disabled by work-related injuries. The laws seek to treat injuries incidental to the employment as a cost of operating a business. The cost of the compensation, although originally borne by the employer, is ultimately passed on to the consumer in the cost of the
product. Under the workers' compensation scheme the employee relinquishes his common law right to sue the employer for damages in return for benefits awarded without regard to fault.¹

Workers' compensation does not purport to include within its scope all the health problems suffered by an employee that happen to make an untimely appearance during working hours. To qualify for workers' compensation the worker must (1) suffer a compensable injury under the Workers' Compensation Act and (2) establish a causal relationship between the employment and the injury.² These two requirements, while easily stated, do pose certain problems which will be examined separately.

1. Determining a Compensable Injury

Traditionally, a compensable injury has included an element of "accident."³ The usual statutory phrase embodying this requirement is "personal injury by accident."⁴ Several states that do not include this term expressly in their statutes read the requirement into the recovery formula by way of judicial interpretation.⁵ A second related component adopted by most states mandates that the

---

⁴. E.g., KAN. STAT. ANN. § 44-501 (Cum. Supp. 1979); N.J. REV. STAT. § 34:15-1 (1937); UTAH CODE ANN. § 35-1-45 (1953). In addition to the common phrase, other phrases which have been used are "accidental injury" and "injury by an accident." See IDAHO CODE § 72-102(14)(a) (Supp. 1979) ("injury" means "personal injury caused by accident"); MISS. CODE ANN. § 71-3-3(b) (1972) ("injury" means "accidental injury or death"); cf. Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 902(2) (1976) (defining "injury" as "accidental injury or death"). The Washington statute refers to injuries of a "traumatic nature." WASH. REV. CODE § 51.08.100 (1978) ("injury" means "sudden and tangible happening of traumatic nature, producing immediate and prompt result").
injury be assignable to a definite time and place.\textsuperscript{6}

The accident and time and place requirements have posed perplexing problems. An early English case, \textit{Fenton v. Thorley & Company},\textsuperscript{7} concluded that the word "accident" denoted "an unlooked-for mishap or an untoward event which is not expected or designed." Since most states adopted this definition when interpreting their own statutes, the basic and indispensable ingredient of "accident" became "unexpectedness."\textsuperscript{8} The problem then became whether it was the cause of the injury or the resulting injury itself that was to be accidental or unexpected.

Two distinct lines of authority developed concerning whether the cause or result had to be accidental. These divisions will be referred to as "accidental cause" jurisdictions and "accidental result" jurisdictions. States that insisted that the accidental nature of the injury be found in the cause formed a restrictive view of what constitutes an injury. In order to satisfy the time and place requirement in an accidental cause jurisdiction, the cause rather than the result must be of a definite time and place as well as be accidental or unexpected.\textsuperscript{9} Therefore, an injury occasioned by a gradually developing condition such as a series of stresses and exertions was excluded from coverage since the specific time of the cause of injury could not be determined.\textsuperscript{10} On the other hand, this kind of injury would be compensable in an accidental result jurisdiction because the result can be assigned to a specific time and place.\textsuperscript{11} Thus, an accidental result jurisdiction is more liberal in the award of workers' compensation benefits.

Author Larson, renowned for his study of workers' compensation laws, attributes the development of the accidental-cause/accidental-result distinction to the subtle conversion of the phrase

\begin{itemize}
  \item \textsuperscript{6} 1B \textsc{Larson}, \textit{supra} note 1, § 37.20, at 7-5; \textit{e.g.}, Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972); \textit{cf. Idaho Code} § 72-102(14)(b) (Supp. 1979) ("accident" means "mishap or event which can be reasonably located as to time and place of occurrence").
  \item \textsuperscript{7} [1903] A.C. 443.
  \item \textsuperscript{8} 1B \textsc{Larson}, \textit{supra} note 1, § 37.20, at 7-4.
  \item \textsuperscript{9} \textit{Id.} at 7-6.
  \item \textsuperscript{10} \textit{See} Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859 (Tex. 1972) (heart attack caused by four frustrating experiences over 19-day period not traceable to definite time, place and cause). \textit{But cf.} R. MacIntyre, Jr., \textit{Workmen's Compensation and Heart Attacks}, 10 \textsc{Hous. L. Rev.} 178, 183 (1972) (court should recognize that heart attack may result from lengthy period of nervous strain).
  \item \textsuperscript{11} \textit{See} New Hampshire Supply Co. v. Steinberg, 119 N.H. 223, 226, 400 A.2d 1163, 1168-69 (1979) (heart attack caused by protracted work-related psychological stress can be compensable; single sudden precipitating event not required); Bill Grover Ford Co. v. Roniger, 426 P.2d 701, 702 (Okla. 1967) (accidental injury may arise from cumulative effect of series of exertions; unnecessary for injury to be attributable to one event).
\end{itemize}
“personal injury by accident” into the phrase “personal injury by an accident.” Once this element was read into the statute the courts were in a position to set forth on an endless search for “the accident” in situations where there did not happen to be some overt mishap. Larson attributes this distortion to a desire to build a retaining wall around liability in the more difficult and less obvious injury cases. When one merely looks for an accidental result there is nothing which seriously circumscribes liability, for there are almost no injuries that are “expected.” If the claimant had expected an injury as a result of his action, he presumably would have avoided the action.

Another source of difficulty with the accidental cause requirement is the “unusual exertion” doctrine. Under this doctrine the employee must prove an unusual exertion in the course of his employment which caused the injury. It must be shown that the injury resulted from an exertion or stress greater than the exertion or stress required in the performance of his usual duties. A common example to illustrate this point is the case of a man who regularly lifts 100-pound sacks. It is not an unusual exertion if he regularly does this in his work; hence, there is no unexpected cause if he suffers a heart attack while lifting a sack in the usual way. However, there is an unusual exertion if a worker lifts even a 25-pound sack if his usual work requires no lifting at all. In such a case he is eligible for compensation if he suffers an injury while doing so.

The accidental cause requirement and the unusual exertion doctrine serve to narrow workers’ compensation coverage and pre-
clude compensation for a large number of injuries. The accidental cause requirement tends to obscure the goal of compensating an employee for a work-related injury by requiring a search for an accident rather than focusing simply on work-relatedness. There is nothing in the accidental injury concept that demands the accidental character to be found in the cause rather than the result. Furthermore, the usual-unusual exertion distinction is unworkable because it is difficult to determine what is unusual in a given case. The doctrine may unfairly exclude one claim from coverage because the same quantum of stress and exertion may be unusual for one worker, but not unusual for another.

A majority of states have now abandoned the unusual exertion doctrine and find that the accidental requirement of an injury is satisfied if either the cause or result is accidental. In these jurisdictions, the injury itself satisfies the accident requirement. The primary emphasis is not whether the injury occurred by accident but whether the work caused the injury. The Supreme Court in Cudahy Packing Co. v. Parramore discussed this fundamental principle of the workers’ compensation system: “The liability is based, not upon the act or omission by the employer, but upon the existence of a relationship which the employee bears to the employment because of and in the course of which he has been injured.” Thus, once the accident requirement is disposed of, the essence of the problem becomes causation, and the first task is to plainly state a legal test of causation.

2. The Causal Relationship

The second element required by the workers’ compensation formula is a causal relationship between the injury and the employment. Most states have adopted the British Compensation Act formula: injury “arising out of and in the course of employment.”

19. See 1B Larson, supra note 1, § 38.82, at 7-230, -231; Heart Injuries, supra note 17, at 1386-87.
21. See 1B Larson, supra note 1, § 38.64(b), at 7-186. See also 1B Larson, supra note 1, § 38.63, at 7-150.
22. Id. § 38.00, at 7-12; e.g., Jackson v. Emile J. Legere, Inc., 110 N.H. 252, 254, 265 A.2d 18, 20 (1970) (“unusual strain” not necessary for heart attack to be accidental because statutory requirement need not be supplied by cause but may be fulfilled by effect).
25. Id. at 423.
26. But see Utah Code Ann. § 35-1-45 (1953). Utah changed the wording of the stat-
This phrase serves to measure the relationship between the injury and the employment. To make the task of construction easier, the phrase has been broken in half with the "arising out of employment" component relating to causal connection, and the "in the course of employment" component concerning the time, place and circumstances of the injury. The two components, however, work together as a single test of work connection.

In applying the "arising out of the employment" component, it is important to note that the employment is thought of more as a condition out of which the injury arises than as the force producing the injury. The phrase is seemingly not equivalent to "legally caused by the employment." In fact, proximate cause or legal cause analogies are out of place in the workers' compensation context. In workers' compensation law the focus is not on some act which causes an injury, but on the relation, condition, or situation—namely employment—which causes an injury. Proximate or legal cause is also out of place in compensation law because it is a concept permeated with the idea of fault. The concept of foreseeability flows from the idea of fault and becomes the primary test to determine legal cause. Under the workers' compensation rationale, the criterion is work connection and not whether the employer foresaw particular kinds of harm or not.

The "in the course of the employment" component requires that a compensable injury must not only arise within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to employment if it carries out the employer's purposes or advances his interests directly or indirectly.

The causal relationship of the injury to the employment is the appropriate focal point for determining a compensable injury. The Montana courts, however, demonstrate a lack of concentration on this issue. Rather, efforts are focused on the first element of the

---

27. 1 Larson, supra note 1, § 6.10, at 3-2.
28. Id.
29. Id. § 6.60, at 3-6.
30. Id.
31. Id. at 3-7.
32. Id. § 20, at 5-1.
33. E.g., Bourn v. James, 191 Neb. 635, 216 N.W.2d 739 (1974) (clear benefit to employer in having ranch hand claimant stay on the premises; claimant was awarded compensation for injuries he suffered in a nighttime fire in his trailer); Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973) (compensation awarded for teachers killed in auto wreck while driving to a meeting; although attendance was not required it was urged and expected).
compensation formula: finding that the worker suffered an injury.

B. Montana

Workers' compensation laws in Montana have undergone a variety of changes in the past few decades, especially in determining what constitutes a compensable injury. The formal changes in the law defining injury were initiated by the legislature. The court, however, has also had a hand in formulating changes. Sometimes the status of the law on injury has not been entirely clear, as Justice Sheehy noted in registering his dissent in Hoehne v. Granite Lumber Company: “in determining what is an ‘injury’ under the Workers’ Compensation Act, this court has demonstrated a quixotic ability to mount its horse and ride off in all directions.”

The two basic requirements of an injury and a causal relationship are set forth in provisions of the Montana Workers’ Compensation Act. An injury, under Montana law, requires a “tangible happening of a traumatic nature from an unexpected cause, or unusual strain, resulting in either external or internal physical harm.” The employer is liable for payment of compensation if an employee receives an injury “arising out of and in the course of his employment.” Prior to 1961, however, an “injury” was defined by statute to refer “only to an injury resulting from some fortuitous event, as distinguished from the contraction of a disease.” The word “fortuitous” under the old definition was interpreted by the Montana court as “happening by chance or accident; coming or occurring unexpectedly or without known cause.” Furthermore, in-

34. Mont. 615 P.2d 863 (1980).
35. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 37-71-119 (1981) provides that ‘injury’ or ‘injured’ means:
(1) A tangible happening of a traumatic nature from an unexpected cause, or unusual strain, resulting in either external or internal physical harm, and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection 2 of this section.
(2) Cardiovascular or pulmonary or respiratory diseases contracted by a paid fireman employed by a municipality, village or fire district as a regular member of a lawfully established fire department, which diseases are caused by over-exertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure over a period of four (4) years or more to heat, smoke, chemical fumes, or other toxic gases.
36. MCA § 39-71-407 (1981) provides that:
eyery insurer is liable for the payment of compensation, in the manner and to the extent hereinafter provided, to an employee of an employer it insures who receives an injury arising out of and in the course of his employment or, in the case of his death from such injury, to his beneficiaries, if any.
juries were held to be accidental or the result of fortuitous events where either the cause or the result was unusual, unexpected or undesigned. In *Hines v. Industrial Accident Board*, the court awarded compensation to a widow whose husband died from polio caused from exposure to sewer and garbage when he worked for the city street department. The court interpreted the definition of injury to include those instances where there is no accident in the ordinary sense, like an act of violence whereby an employee is struck by an object or injured by a fall.

Because of these decisions, Montana was clearly an accidental result jurisdiction, and, as exemplified by *Murphy v. Anaconda Co.*, the court flatly rejected the unusual exertion doctrine. In *Murphy*, the employee suffered a heart attack and died while on the job. Compensation was awarded. The court first found that "the fact that he may have been suffering from a pre-existing weakness does not detract from the right to recover compensation because the employer takes the employee as he is." The court went on to hold that:

An accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or contributing cause of the injury. In short, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary.

The *Hines* decision was handed down on the eve of the convocation of the 1961 Legislative Assembly. Some commentators felt that by the time *Hines* was decided the court had relegated the old definition of injury to complete oblivion. During the 1961 session the legislature amended the statute defining injury to specifically limit Montana to the status of an accidental cause jurisdiction. The amendment defined "injury" to mean: "a tangible happening of a traumatic nature from an unexpected cause, resulting in either external or internal physical harm." Three cases demonstrate the hardships imposed by the 1961 amendment.

41. *Id.* at 596, 358 P.2d at 451.
42. 133 Mont. 198, 321 P.2d 1094 (1958).
43. *Id.* at 207, 321 P.2d at 1099.
44. *Id.* at 209, 321 P.2d at 1100.
46. R.C.M. 1947 § 92-418 (emphasis added).
In Lupien v. Montana Record Publishing Co., 47 the claimant was a mailer who had been on the same job for 27 years. One morning, after reporting to work, he suffered a heart attack and died. The district court found that Lupien had worked hard the previous day and on the day of the heart attack. The supreme court, however, held that even accepting the lower court’s version of the record, the “tangible happening of a traumatic nature from an unexpected cause” was not present. The court stated: “Everything done by Lupien was expected of him and by him. It was his work to do just as he was doing and in varying degrees just as he had been doing for some 27 years.”

The court supported its decision denying compensation by pointing out that “the old phrase ‘fortuitous event’ included either (1) an unexpected cause or (2) an unexpected result, whereas the new phrase is limited to a tangible happening of a traumatic nature from an unexpected cause.”

As a consequence of the accidental cause requirement imposed by the legislature, the court was forced to search for “an accident” or find an “unusual exertion” to justify the new definition of injury. This reflected an about-face from the holding enunciated in Murphy and Hines.

The emphasis shifted to finding an injury rather than focusing on the more appropriate element of a causal relationship between the injury and the employment.

Strain-type injuries, as well as heart injuries, posed a particular problem under the accidental cause requirement because the activity causing the strain is rarely “unusual” or “unexpected.” This situation is illustrated in James v. V.K.V. Lumber Co. 50 In James, the claimant was employed as a lumber stacker. While at work he bent over to pick up a block of wood weighing 10 to 15 pounds and in bending over felt a pain in his back. The next morning he was barely able to get out of bed. A doctor diagnosed the injury as “lumbosacral strain.” The claimant was disabled for approximately one month. When he sought compensation, however, the court held that he had not suffered an injury as contemplated by the statute, because lifting the wood block was expected of him and performed routinely by him. 51 Following the rationale of Lupien, the court held that there was simply no “tangible happening of a traumatic nature from an unexpected cause.”

---

47. 143 Mont. 415, 390 P.2d 455 (1964).
48. Id. at 419-20, 390 P.2d at 458.
49. Id. at 418, 390 P.2d at 457.
51. Id. at 469, 401 P.2d at 283.
52. Id.
A third case demonstrating the new burden placed upon a claimant is *Miller v. City of Billings.* The claimant had been employed to operate a dozer covering garbage at a landfill dump. The claimant was overcome by diesel fumes from equipment and smoke from burning trash while working at the dump. Although the court ruled that the claim was barred by the statute of limitations, it found that claimant’s diagnosed condition of pulmonary fibrosis fell outside the definition of injury as set out in the statute. The court issued this appraisal of the consequences of the gassing: “in the instant case claimant was doing his usual work in the expected way at all times. His exposure to dust and smoke was a normal incident of employment at the landfill dump.” Furthermore, since the condition developed over a long period of time rather than being triggered by any single episode, the court rejected this as an injury. In this instance the causal connection seemed plausible, but the court was caught in the trap of looking for an unexpected cause to justify the finding of an injury.

After the decision in *Lupien* was announced, at least three bills were placed before the legislature proposing changes in the definition of injury formulated by the 1961 amendment. One bill would have included “strains” in the definition, but this and the other measures were killed. When the legislature convened in 1967, it succeeded in amending the injury statute—this time inserting the term “or unusual strain” after “an unexpected cause.” This language has served as the definition of injury to the present day. The amendment apparently abolished the accidental cause requirement for injuries arising from strains but preserved the requirement for all other injuries.

One of the first cases involving a strain-type injury to come before the court after 1967 was *Jones v. Bair’s Cafe.* Claimant Jones was on shift as a dishwasher when she picked up a tray of dishes and suffered a back strain. The court found that the 1967 amendment was intended to cover just such a situation: “There was no ‘unexpected cause’ but there was an ‘unusual strain’; thus the measure would seem to be the result of a tangible happening of a traumatic nature which results in physical harm, be it a rupture, a strain, or a sprain.”

54. *Id.* at 95, 555 P.2d at 449.
55. *Id.*
57. *Id.*
59. *Id.* at 19, 445 P.2d at 926.
A subsequent case, *Robins v. Ogle*, reinforced the concept that a strain, to be a compensable injury, need not be unusual from a standpoint of cause. In *Robins*, the claimant suffered a back strain while performing her usual duties. The court stated:

While it may be arguable in the instant case whether the strain was unusual from the standpoint of cause, it is clear that the effect here was unusual—herniation of an intervertebral disc resulting from picking up the bucket in the wrong manner and turning to pick up the mop. An unusual result from a work-related strain qualifies as an "unusual strain."  

Both *Jones* and *Robins* make it clear that the statute requires a showing of some tangible happening of a traumatic nature in addition to the resulting strain before an injury arises. In these cases, the court seems to require a specific happening or incident that can be assigned to a specific time and place. This "tangible happening," whether usual or unusual, must be deemed to have caused the strain before there is an injury. The result of Montana's independent requirement that a strain must result from a "tangible happening of a traumatic nature" is that a triple burden is placed upon the claimant to prove a compensable injury. The claimant must: (1) demonstrate a tangible happening of a traumatic nature, (2) show this to be the cause of the strain, and (3) satisfy the causation element of the formula that the injury arose out of and in the course of his employment.

The phrase "tangible happening" also seems to denote a single episode that caused the strain, but the Montana court has not been that strict in interpreting these words. In *Love v. Ralph's Food Store*, the claimant suffered a back strain from continually lifting heavy objects as part of her job as a meat wrapper. The claimant could not relate her condition to any single incident or specific happening. The court, however, managed to wade through some confusing testimony to pluck out two dates where claimant suffered muscle spasms while lifting a meat grinder and a 50-pound casing respectively. This problem also arose in *Hoehne v. Granite Lumber Co.*, where the claimant suffered numbness in his hands from stacking lumber on a daily basis over a two and one-half month period. The condition developed gradually, wors-
ened over a period of time, and could not be attributed to a specific incident. Rather than strive to find specific dates of incidents causing the strain, the court relied upon the definition of "tangible happening" that had been developed in Erhart v. Great Western Sugar Co. With regard to the requirement of a "tangible happening of a traumatic nature" the court stated:

A tangible happening must be a perceptible happening, Webster's Third New International Dictionary. Some action or incident, or chain of actions or incidents must be shown which may be perceived as a contributing cause of the resulting injury.

To an extent, the Montana court has been liberal in its interpretation of "tangible happening" with regard to strain injuries. However, these cases show that the court is still looking for something perceptible from the record as the cause of the injury, rather than allowing the injury itself to satisfy the requirement for an injury.

C. Heart Injuries

The adjudication of claims for heart injuries under workers' compensation laws is especially difficult because of the progressive nature of coronary heart disease and the ambiguous relationship of emotional stress and physical exertion to the development and aggravation of coronary heart disease. Medical uncertainty in this area impedes the determination of a causal relationship between employment and heart injury.

An estimated 30 million Americans suffer from cardiovascular disease. Approximately 1.25 million heart attacks occur each year. In 1975 cardiovascular disease accounted for 52.5 percent of all deaths in the United States. Given the dominant position of heart disease as a source of disability and death, the extent to which workers' compensation assumes both medical and income maintenance responsibility for the victims of heart disease has a heavy bearing on the comprehensiveness, cost and ultimate direction of the system. Obviously, if the heart attack is a genuinely work-related injury, to deny compensation benefits would be a
gross violation of the legislative purpose and of workers' rights. It is equally obvious that, under workers' compensation coverage, compensation cannot be paid for every heart attack that occurs during working hours.

In some jurisdictions the courts have shown an increased willingness to treat heart attacks as work-related injuries under workers' compensation laws. This broader concept of the relationship between employment and heart injuries has developed for various reasons: advancements in medical knowledge, the traditional policy of liberally construing workers' compensation statutes in favor of the worker, and possibly the realization that a disabled worker's best hope for financial assistance is often workers' compensation benefits. Other jurisdictions, however, have been less generous. A desire to limit the number of compensable heart injuries has led certain states to revive the "unusual exertion" doctrine as a required element of legal causation.

Montana's workers' compensation laws have not readily accommodated compensation for heart injuries. The necessity of pinpointing a "tangible happening of a traumatic nature" that caused the heart attack has resulted in searching for some unusual exertion or activity out of the ordinary. Case law has established that the "tangible happening" that causes a heart attack need not be unusual or unexpected, but it is obviously easier to establish causation by showing an unusual exertion. This is particularly true in heart cases because of conflict among medical authorities as to the role that emotional stress and physical exertion play in the aggravation or acceleration of coronary heart disease. The following cases demonstrate the difficulty in adjudicating claims for heart injuries in Montana.

In Hurlbut v. Vollstedt Kerr Co., the claimant was the superintendent of a lumber mill. It was company policy not to operate the mill when the temperature was too cold for men and ma-

73. Id.
74. Id. at 445.
75. Note, Cardiac Claims Under California's Workmen's Compensation Law, 21 Hastings L.J. 745, 749 (1970) (employers allege that conflict in medical testimony invariably resolved in favor of claimant because courts construe law liberally); Workmen's Compensation and Heart Attacks, 10 Hous. L. Rev. 179, 179 (1972) (liberal approach towards recovery results from difficulty in establishing causation and general desire by courts to allow recovery).
77. 167 Mont. 303, 538 P.2d 344 (1975).
chinery. During the winter of 1973, particularly cold weather caused the mill to be shut down for more than a week. While the temperature was still colder than the normal operating temperature, the owner of the mill ordered the claimant to contact employees of the mill and begin operation the next day. Shortly after he got the mill operating, the claimant suffered a heart attack. The court held:

Aside from the testimony that it was a few degrees colder than normal starting temperature and the mill had not previously operated in temperatures that cold, there was no testimony this imposed upon claimant any duty which was unusual in kind or amount. The duties performed by claimant on the day before his attack . . . were duties he had performed for the previous eight years as plant superintendent. Simply opening a mill on a day colder than customary, with no inordinate kind or amount of work on his part, cannot be said to constitute 'a tangible happening of a traumatic nature.'

Therefore, the court denied the claim for compensation because there was no injury as determined by the statute. The stumbling block in the claimant's case was that the doctor could not pinpoint the cause of the claimant's heart attack.

*Stamatis v. Betchel Power Corp.* involved a claim brought by a widow whose husband was employed as an electrician. The decedent collapsed on the job and died of a heart attack. Conflict ing testimony was given as to the decedent's activity just before the collapse. Medical testimony also conflicted at several points. The court concluded that decedent had been cleaning light fixtures prior to his collapse and that his activity was "not of a strenuous physical nature, nor was it unusual, nor was the outside air temperature a factor in precipitating his collapse." Consequently, the court held that there was "simply no evidence in the record of any real, perceptible, or identifiable incident, action, or happening of a traumatic nature within the definition of injury in the Act."

One of the most recent cases in this line of heart injuries is *Moen v. Decker Coal Co.* This decision provides a thorough explanation of the injury requirement applicable to both heart and non-heart injuries. In this instance the employee was working overtime steam cleaning various pieces of heavy equipment, a task not

78. Id. at 307, 538 P.2d at 346 (emphasis added).
80. Id. at ___, 601 P.2d at 406 (emphasis added).
81. Id.
82. ___ Mont. ___, 604 P.2d 765 (1979).
part of his usual job. He was also assigned to drain the cleaner and store the hoses. Later in the day, after he had finished, he suffered a heart attack and died. His widow filed a claim for compensation. The court first determined that two elements from the injury statute must be met: "(1) There must be a tangible happening of a traumatic nature, and (2) this must be shown to be the cause of physical harm . . . ." In explaining the first element of the injury formula the court stated:

A tangible happening must be a perceptible happening . . . . Some action or incident, or chain of actions or incidents, must be shown which may be perceived as a contributing cause of the resulting injury. This court has found neuroses compensable, but a tangible, real happening must be a cause of the condition.

Regarding the second element or the causal element of the injury requirement the court stated:

The death must be proven to be the result of a tangible happening of a traumatic nature. The claimant bears the burden of proving by a preponderance of the evidence that a tangible happening of a traumatic nature proximately caused physical harm . . . and must show more than the mere possibility that the happening caused the harm. If the evidence indicates a worker suffered a heart attack while at work, rather than as a result of work, no injury occurred under the statute.

The court concluded that there was no injury because the claimant totally failed to prove that her husband's death resulted from a "tangible happening of a traumatic nature." Rather, the evidence supportive of a valid claim went to the collateral matter of aggravation of the decedent's condition and did not form solid links of a chain of events.

The independent requirement of finding a tangible happening of a traumatic nature diverts attention to a search for accidents and incidents and away from the more appropriate issue of causation. This requirement also tends to revive the "unusual exertion" doctrine in establishing the cause of an injury. The result is an additional burden on the employee/claimant and narrower application of workers' compensation benefits.

83. Id. at ___, 604 P.2d at 767 (citations omitted).
84. Id. (citations omitted).
85. Id. (citations omitted and emphasis added).
86. Id. at ___, 604 P.2d at 768.
87. Id. at ___, 604 P.2d at 767.
D. A Suggested Solution

Some jurisdictions have adopted presumptions altering the claimant’s burden of proof. The broadest type of presumption employed is one which presumes that the claim made by the worker is for a compensable injury. An opponent may rebut the presumption by substantial evidence that the injury was unrelated to the employment. The underlying policy for these provisions is that doubt should be resolved in the employees’ favor. The presumption is especially strong in heart injury cases because of the uncertainty concerning the causes of heart diseases.

Such a presumption would ease the difficulty of establishing a causal relationship between employment exertion or stress and injury. In Montana it would serve to avoid the difficulties in pinpointing an injury. The requirement of showing a tangible happening of a traumatic nature which caused the injury would be abolished. Rather, the injury itself would satisfy the injury element of the formula and emphasis would shift to whether or not the employment caused the injury. The presumption could be rebutted by substantial evidence that the work-related stress or exertion did not contribute to the occurrence of the injury.

The medical relation of exertion and stress will have to be left to doctors; meanwhile, the legal system must provide a workable solution for compensating work-related injuries. An important factor to bear in mind is that the objective of workers’ compensation is to promote safety in the work place and to provide benefits to workers disabled from work-related injuries.


91. See Wheatley v. Adler, 407 F.2d 307, 313 (D.C. Cir. 1968) (presumption that heart attack within provisions of statute not rebutted; court noted that limited medical ability to reconstruct why “something unexpectedly goes wrong with human frame” makes rebuttal difficult).

II. OCCUPATIONAL DISEASE

A. Introduction

The Occupational Disease Act of Montana\textsuperscript{93} was hastily enacted in 1959 to provide compensation to disabled workers suffering from work-related diseases. As with workers' compensation, employees relinquished their right to sue the employer for negligence in return for speedy and fair compensation. Up to the present time, however, employees with work-related diseases have yet to receive their part of the bargain. Meritorious occupational disease claims are being denied or not even filed. It may be true that employers and insurers have interests that need protection, but this protection should not be granted to the detriment of workers with genuine, meritorious claims.

Of the 34,736 injuries and diseases reported to the Montana Workers' Compensation Division for fiscal year 1980, only 243 were classified by the Division as diseases.\textsuperscript{94} This statistic belies the magnitude and severity of the occupational disease problem. National statistical studies reveal an incidence of occupational disease far exceeding that which Montana has reported. The most recent national study, which was done by the U.S. Department of Labor, indicates that by 1978 there were almost 2 million workers disabled by occupational diseases. Approximately 700,000 were suffering from long-term total disability, and another 1.2 million were partially disabled.\textsuperscript{95} Two older national studies indicate that there may be as many as 100,000 deaths per year from occupationally caused diseases\textsuperscript{96} and an estimated 390,000 new cases of occupational disease each year.\textsuperscript{97}

Extrapolating from these latter national studies, using the proportion of Montana's population to the national population as a base, in 1980 Montana should have reported an estimated 1,377 new cases of occupational disease rather than 243.\textsuperscript{98} The discrep-
ancy indicates that Montana's occupational disease compensation system is not performing its original purpose. The second part of this comment will discuss why, and will also propose some legislative solutions.

Prior to this discussion, however, it is necessary to scrutinize the definition of disease. When the Montana legislature created the occupational disease compensation system it created the system on a mistaken assumption that there is a logical and rational difference between disease and injury. The following material will show that there is not, and that the first change which must be made in the occupational disease compensation system is that the definitions of disease and injury must be legislatively consolidated.

**B. Consolidation**

To demonstrate that the definitions of disease and injury should be consolidated, it is necessary to show that disease and injury are not mutually exclusive. Ever since the first workers' compensation statutes were enacted at the turn of the century, even before the term "occupational disease" was coined, courts and administrative bodies have been troubled with the difference between disease and injury. To date, no one, including any appellate judge, legislator, lawyer or physician, has been able to define satisfactorily disease to the exclusion of injury. The opinion of Justice Cardozo, in *Connelly v. Hunt Furniture Co.*, a 1925 New York case, illustrates this difficulty. In *Connelly*, an undertaker's son developed blood poisoning when gangrene infection entered his blood by a small cut while he was handling a gangrenous corpse. Cardozo, writing for the court, said, "We attempt no scientifically exact discrimination between accident and disease, or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one of the other, but often overlap."

The Montana legislature, had it consulted with a few local physicians in 1959, would have recognized that there is no essential, logical or consistent difference between disease and injury. Instead, the legislators, relying on their own preconceived notions of disease, created a dual system of compensation. To an already illogical, inconsistent, unworkable definition of injury, they added

---


100. 240 N.Y. 83, 147 N.E. 366 (1925).

101. *Id.* at 85, 147 N.E. at 367.
more complications. Understandably, the term “occupational disease” was broadly defined in the Occupational Disease Act. Occupational disease “means all diseases arising out of or contracted from and in the course of employment.”

Probably, the legislature intended to give the courts and the Industrial Accident Board room for interpretation, but the legislature was also proceeding on the false assumption that there is a definable and logical difference between disease and injury and that the courts and the Industrial Accident Board knew the difference.

It was inevitable that reality would catch up with the legislature’s mistake. In fact, the Montana Supreme Court was having definitional problems even before the Occupational Disease Act went into effect. In Hines v. Industrial Accident Board,

decided on the basis of law in effect prior to the Occupational Disease Act, the court held that poliomyelitis contracted by a street worker exposed to unsanitary working conditions constituted an injury. Justices Castles and Harrison dissented, asserting that poliomyelitis was a disease. The latest case that demonstrated this confusion is Hoehne v. Granite Lumber Co., discussed earlier in this comment. In Hoehne, four justices held that bilateral carpal tunnel syndrome, a disease of the hand caused by continued flexion of the hand muscles, was an injury. Justice Sheehy dissented and maintained that it was a disease. The problem will soon surface again unless the two definitions are consolidated.

Not all legislators, judges or lawyers have exactly the same preconceived notion of disease. However, whatever preconceived notion an individual may rely upon, that notion is almost always based upon one or more of the following assumptions: (1) that a disease is caused by a repeated or gradual exposure, (2) that a disease is manifested over a period of time, (3) that a disease is caused by a chemical, bacterial, or viral agent as opposed to a physical agent such as a heavy weight or a sharp object, (4) that a disease is expected but that an injury is unexpected, or (5) that proof of work-relatedness is different for a disease than it is for an injury. As will be seen, all of these assumptions are false, and if they are followed they lead to absurd results and inconsistent, il-

103. The Industrial Accident Board was the forerunner of the Workers’ Compensation Board.
105. Id. at 598, 358 P.2d at 452.
logical case law. The first assumption, being the one most relied upon, is discussed at greater length than the other assumptions.

Assumption 1: A Disease is Caused by a Repeated or Gradual Exposure.

This assumption, which could be labeled the "extended exposure rule," was well expressed in Summer v. Victor Chemical Works,108 a federal decision interpreting Montana law. In that case, the court held that a claimant who had received multiple exposures to phosphorus fumes had suffered an occupational disease. Relying upon the extended exposure rule, the court held:

Though poisoning can be a gradual process (when it would not have been deemed an accident within some workmen's compensation acts) it can also be a sudden and complete impregnation (when the incident may also constitute an accident within most workmen's compensation acts).109

There are three reasons why the extended exposure rule will not suffice in Montana to distinguish between disease and injury. The first reason is that many bodily ailments, which any man-on-the-street would call a disease if he saw the victim in a hospital bed, are caused from a single exposure or at least have some definite, ascertainable beginning. If the extended exposure rule were followed consistently, any disease that had a definite point of beginning would have to be called an injury regardless of its subsequent or continued effects. In the Cardozo case, Connelly v. Hunt Furniture Co.,110 the blood poisoning contracted by the single exposure to gangrenous tissue would have to be classified as an injury. In fact, most infectious diseases would have to be classified as an injury simply because they are contracted from a single exposure. A traveling employee who contracts malaria from a mosquito bite would have an injury.111 A hospital worker who contracts hepatitis from an infected blood sample would have an injury.112 (Those states that see through the fallacy of the extended exposure rule classify hepatitis as an occupational disease.)113 A delivery man who is bitten by a rabid dog and dies six months later would

108. 298 F.2d 66 (9th Cir. 1961).
109. Id. at 67-68.
have an injury. A woman who dies from tetanus 25 days after cutting herself on some machinery would have an injury. An employee who accidently spills a carcinogenic chemical on open tissue and subsequently develops cancer would have an injury. Cancer caused by a single traumatic blow from a physical agent would be an injury.

The extended exposure rule, if followed consistently, can lead to absurdities. In Montana, a psychological problem that develops as the aftermath of a classical injury must be compensated as an injury. In Berger v. Hahner, Foreman & Cale, Inc., a Kansas case wherein neurosis followed a physical injury, the court held that, "when a primary injury . . . is shown to have arisen out of course of employment every natural consequence that flows from the injury, including a new and distant injury, is compensable if it is a direct and natural result of a primary injury." Pennsylvania labeled this kind of rationale as the "unusual pathological result doctrine" and applied it in Hatboro-Horsham School District v. Workmen's Compensation Appeals Board. Therein, an employee knelt on cold cement for several hours. His right knee became swollen and infected with staphylococcus. The infection eventually spread throughout his entire body and aggravated pre-existing medical problems. The man finally died of coronary and liver failure. The court held that it was an injury.

A second reason that the extended exposure rule will not suffice in Montana to distinguish between disease and injury is that there is no consistent method for determining which exposures are sudden and which are extended. Consider the following hypothetical situations: (1) Two men are exposed to subzero temperatures for several hours. One gets frostbite; the other contracts pneumonia. Has one suffered an injury, but the other a disease? (2) An employee delivers first aid to a fellow worker for two hours in cold weather. The employee later develops undefinable medical problems in his leg and it has to be amputated. Was the exposure sudden or extended? The Montana Supreme Court held that it was

117. Gray, supra note 114, at ¶ 72.11.
120. Id. at 545, 506 P.2d at 1179.
sudden enough to call this bodily harm an injury. A miner, trapped in a mine disaster, inhales smoke and gas for 40 hours. Was the exposure sudden or extended? A painter inhales paint mist containing a toxic chemical for three hours. Was the exposure sudden or extended? An asphalt worker who suffers a sunstroke after working all afternoon in the hot summer sun dies 11 days later. Was the exposure sudden or extended? Two men who work in the same industrial plant contract the same infectious disease. Neither man received any exposure to the disease outside of his employment. One of them knows exactly when and where he was exposed. The other knows only that he has the symptoms. Has this second man suffered a disease instead of an injury simply because he cannot prove when he contracted the disease?

A third reason that the extended exposure rule fails is that the Montana Supreme Court has classified many extended exposure cases as injury cases. In Hoehne, the claimant was exposed to continued flexion of the hand muscles for over two months. The court said that he had an injury. In Love v. Ralph’s Food Store, the court held that the claimant had suffered an injury where she had been lifting heavy objects over a period of several weeks. Also suffering injuries was the miner trapped in the smoke-filled mine for 40 hours, and the man who contracted poliomyelitis from continued exposure to unsanitary working conditions.

Assumption 2: A Disease Manifests Itself Slowly.

Not all diseases manifest themselves slowly. Tetanus, for instance, may become evident within one day. Allergies may show up within minutes upon contact with a harmful source. In Greger v. United Prestress, Inc., the claimant developed contact dermatitis, an allergic reaction, while welding near cement. The

123. Wirta v. North Butte Mining Co., 64 Mont. 279, 210 P.2d 332 (1922) (upheld sudden exposure leading to injury).
130. Gray, supra note 114, ¶ 40.18.
claimant did not file his claim for a few weeks, and when the case finally reached the supreme court, the court held that he had an occupational disease. If he would have filed his claim after the very first day of welding, would he have had an injury? What constitutes a lengthy manifestation period—a few hours, a few days or a few years? These questions could be debated for years without resolution.

**Assumption 3: A Disease is Caused by Chemical or Biological Agent.**

Not all diseases are caused by chemical, bacterial or viral agents. Some forms of cancer and some forms of arthritis can be caused by a single, physical, traumatic blow. Repetitive, physical micro-trauma accounts for several common ailments: tennis elbow in a tennis teacher, frozen shoulder syndrome in shelf stockers, housemaid’s knee (pre-patellar bursitis), arthritis, vibration disease in workers using compressed-air tools, and of course, bilateral carpal tunnel syndrome. Low temperatures can make a person more susceptible to pneumonia. Prolonged exposure to noise can lead to occupational deafness. A sudden change in atmospheric pressure can cause the bends in miners and divers. Mental stress can develop into physical or psychological ailments. Exposure to electromagnetic waves such as x-rays, gamma rays and ultra-violet rays, and exposure to ionizing radiation can cause extremely serious diseases.

---

133. GRAY, supra note 114, ¶ 72.11.
134. GRAY, supra note 114, ¶ 19F.00.
136. GRAY, supra note 114, ¶ 2.82(1).
137. GRAY, supra note 114, ¶ 19F.00.
138. GRAY, supra note 114, ¶ 3.80.
145. Ionizing radiation is the exposure to radioactive isotopes, such as radium, uranium, thorium, actinium and polonium. This radiation, which is composed of alpha particles, beta particles and gamma rays, destroys tissue by stimulating cell activity beyond the capacity of the cell. GRAY, supra note 114, ¶¶ 69.01.-21, 71.02.
The assumption that diseases arise from chemical or biological agents also fails because Montana law classifies many chemically or bacterially caused diseases as injuries. Cardiovascular, pulmonary and respiratory diseases, which are often caused by chemical, bacterial, or viral agents, are expressly included within the definition of injury. Moreover, the supreme court has construed the concept of injury to include certain ailments caused by chemical or biological agents.

Assumption 4: A Disease is Expected, but an Injury is Unexpected.

This assumption does not withstand even a superficial critique. From a worker's standpoint, all diseases and injuries are simply more or less predictable. A coal miner may expect to contract black lung far more than he expects to break his leg, but this alone should not give license to a legislature, court or administrative body to label the black lung expected but the broken leg unexpected.

The labels "expected" and "unexpected" are subjective. For instance, a coal miner who contracts black lung in a mine where he had a 50 percent chance of contracting this disease may label his black lung "unexpected." On the other hand, another miner who breaks his leg in a mine where he had a 50 percent chance of breaking his leg may label his broken leg "expected." These labels are devoid of any descriptive substance upon which to base a distinction between disease and injury. By themselves, the labels do nothing to advance any solution to the occupational disease problem or the workers' compensation problem. As was clearly pointed out earlier, focusing on such labels actually detracts from the real question of work-relatedness. Legislators, judges and state administrators would do well to throw such terms out of their vocabulary.

146. Radiodermatitis is one of the most common industrial diseases caused by exposure to radioactive isotopes. Gray, supra note 114, ¶ 71.01. See also McCormick v. United Nuclear Corp., 87 N.M. 274, 532 P.2d 203 (1975) (lung cancer contracted by uranium mine worker); Kress v. Newark, 8 N.J. 562, 86 A.2d 185 (1952) (skin cancer contracted by X-ray technician); Besner v. Walter Kidde Nuclear Laboratory, 24 A.D.2d 1045, 265 N.Y.S.2d 312 (1965) (leukemia contracted by laboratory technician).


Assumption 5: Proof of Work-relatedness is Different for Disease than it is for Injury.

The core requirement of both an occupational disease claim and an injury claim is proof of work-relatedness. For an occupational disease, the statutory requirements of work-relatedness, contained in Montana Code Annotated [hereinafter cited as MCA] § 39-72-408 (1981), are met only if:

1. there is a direct causal connection between the conditions under which the work is performed and the occupational disease;
2. the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment;
3. the disease can be fairly traced to the employment as the proximate cause;
4. the disease does not come from a hazard to which workmen would have been equally exposed outside of the employment;
5. the disease is incidental to the character of the business and not independent of the relation of employer and employee.

Montana attorneys have tended to shy away from using the Occupational Disease Act on the presupposition that proving work-relatedness for a disease is inherently more difficult than proving work-relatedness for an injury. When a claimant has had a bodily ailment that is not readily classified as a disease or an injury, the claim is usually brought under the injury statutes. This is unnecessary. If work-relatedness cannot be proven under the occupational disease statutes, then work-relatedness cannot be proven under the injury statutes either.

The essential elements of work-relatedness for an occupational disease claim are the same as the essential elements of work-relatedness for an injury claim. Subsection (1) of MCA § 39-72-408 (1981) is a cause-in-fact test. The same cause-in-fact test is expressed in the requirements for a compensable injury. The last four subsections of MCA § 39-72-408 (1981) can be summarized as a requirement that the disease be reasonably peculiar to the employment environment.149 This requirement is not a true cause test but serves more as a statement of social policy to limit the number and kind of occupational disease claims. Just as there is, in the injury statutes, a social policy at work to prevent every employee who shows up with an injury during working hours from being compensated, there is also the same social policy at work in the occupational disease compensation system to prevent employees

from receiving compensation for the common cold. And just as there is a lingering requirement of unexpectedness in the injury statutes, so also is there a lingering requirement of unexpectedness in the disease statutes. A disease which is peculiar to the work environment is "unexpected" but for the employment. Proving work-relatedness for an occupational disease is the same as proving work-relatedness for an injury.\textsuperscript{150}

As demonstrated, preconceived notions of what a disease is and what a disease is not do not bear any relationship to established medical facts, nor are these preconceived notions supported by any supposed difference in the proofs of work-relatedness for disease and injury. Except for the fact that partial disability is not allowed for occupational disease in Montana,\textsuperscript{151} the two compensation systems are identical. As a first step toward improving the occupational disease compensation system and the workers' compensation system, the definitions of disease and injury should be consolidated.

C. The Occupational Disease Act Has Not Achieved Its Intended Purpose.

The Montana Occupational Disease Act has failed workers for two reasons. First, the burden of proving work-relatedness requires more accuracy than medical science can supply. Second, the statute of limitations for filing an occupational disease claim begins to run at a time that bears no rational relationship to the long latency periods of many diseases, thus cutting off many meritorious claims years before the claimant even discovers his disease.

1. Proof of Work-relatedness

As just explained, one of the elements of proving an occupational disease claim is that the disease must be reasonably peculiar to the employment environment. Other states have imposed similar statutory and judicial requirements.\textsuperscript{152} Through the 1950s, however, courts often applied a more rigid standard—that the disease be strictly peculiar to the employment environment. For example,

\begin{itemize}
\item [\textsuperscript{150}] To some extent, there is a "tangible happening" requirement in occupational disease, whether it be inhaling noxious fumes, cutting a finger with an infected knife, or working in proximity to a co-employee who has an infectious disease.
\item [\textsuperscript{152}] See generally Note, Compensating Victims of Occupational Disease, 93 HARV. L. REV. 916 (1980) [hereinafter cited as Victims].
\end{itemize}
in *Pattiani v. State Industrial Accident Commission*,\(^\text{153}\) a sales-
m\an from California traveled to New York City which was epi-
demic with typhoid fever at the time. The salesman contracted ty-
phoid fever but was denied benefits on the basis that the disease
was common to life—in other words, he could have contracted ty-
phoid fever off the job as easily as on the job. Since that time, this
requirement has been relaxed, although more than just lip service
is still paid to it.\(^\text{154}\)

Blending in with this peculiarity requirement is the more sim-
ple requirement that there be a "direct causal connection"\(^\text{155}\) be-
tween the disease and the employment. This is the real hurdle. For
a great number of disease cases, a direct causal link simply cannot
be medically proven to the degree that the court requires.\(^\text{156}\) The
result is that few occupational disease claims are paid. To an ex-
tent this may be a desirable social goal; after all, the occupational
disease compensation system was not designed to be a social insur-
ance program. However, consideration must be given to those
workers with meritorious claims. The question then boils down to
this: at what point should the claimant be given the benefit of the
doubt?\(^\text{157}\)

The burden of proof currently required of the claimant by the
Montana Supreme Court is that he prove his case by a reasonable
medical certainty.\(^\text{158}\) The court will not accept as reasonable medi-
cal proof the testimony of a medical expert that a claimant's dis-
ease was possibly caused by his employment.\(^\text{159}\) Thus, distinguis-
ning between possible and probable causation is critical. Perhaps it
should not be, for medical experts may not mean the same thing
by "possible" as lawyers do.\(^\text{160}\)

---

156. Benzene and xylene, for example, are suspected carcinogens, but little is known
about them. How would a claimant ever establish a causal link between these two com-
ponents and any disease?
157. See Victims, supra note 152.
159. Id. at 19-20, 417 P.2d at 99.
160. The following cases explain this point:
Scobey v. Southern Lumber Co., 218 Ark. 671, 238 S.W.2d 640 (1951): Testimony of the
cause of the claimant's lung cancer was at best of the "possible" variety. He was compen-
sated nevertheless because the court concluded that the defendants could not prove their
side of the case—\textit{sub silentio}, a shift of the burden of proof.
McCallister v. Workmen's Compensation Appeals Board, 69 Cal. 2d 408, 71 Cal. Rptr.
697, 445 P.2d 313 (1968): The wife of a fireman received compensation where her husband
died of lung cancer. Decedent had been on the job for 32 years, but had also smoked a pack
of cigarettes per day. The court held that the smoke he had inhaled while on the job had
Because proving work-relatedness is so difficult in typical disease cases, the occupational disease compensation system, originally intended to be a non-adversarial process, has turned into a great legal and medical battlefield. There are a few diseases inherently associated with certain occupations, and for these, the link between the illness and the workplace may be as clear as for a classical injury. Most diseases, however, are not unique to the workplace or often involve multiple causes. The effects of carcinogens found in the workplace, for example, are rarely medically distinguishable from the effects of carcinogens found outside the workplace. For cases like these, there will be at least one, and usually several, expert witnesses. The result is that occupational disease claims are six times more likely to be contested than workers' compensation claims. The average occupational disease claimant waits one year to receive compensation, whereas an injured claimant will usually wait only two months. Employers and insurers with time and money to spare can force an out-of-work, "reasonably probably" caused his death. "Given the present state of medical knowledge, we cannot say whether it was the employment or the cigarettes which 'actually' caused the disease; we can only recognize that both contributed substantially to the likelihood of his contracting cancer."

Bolger v. Chris-Anderson Roofing Co., 112 N.J. Super. 383, 271 A.2d 451 (1970): A two-packs-a-day smoker who was subjected to fumes of tar, pitch, asphalt and asbestos was compensated despite ambiguous testimony by a medical expert. The expert testified that it was "reasonable to assume" that the combination of all these deleterious materials "contributed" to plaintiff's cancer, but that it was "speculative" whether the man would have contracted cancer had he not been smoking.

Smith v. Humbolt Dye Works, Inc., 34 A.D.2d 1041, 312 N.Y.S.2d 612 (1970): A dyer of wool yarns contracted papillary tumors of the bladder, allegedly from 25 years of exposure to known carcinogens in the dye. Two medical experts testified that there was no causal link between the occupation and the disease. Two other medical experts testified that there was a high correlation between exposure to these carcinogens and this particular disease. Neither of the latter medical experts produced any statistics demonstrating this correlation, although one did make references to their existence. Compensation was granted despite the conflicting evidence. See also Musselwhite, Medical Causation Testimony in Texas: Possibility Versus Probability, 23 Sw. L.J. 622 (1969).

161. This class of diseases includes those to which the workplace contributed and at the same time other sources of the disease are present. For instance, an asbestos worker who smokes cigarettes has eight times the risk of lung cancer compared to cigarette smokers of the same age, but 92 times the risk of men who neither work with asbestos or smoke. Selikoff, Multiple Factor Interaction In Occupational Diseases, PROCEEDINGS, supra note 97.


164. INTERIM REPORT, supra note 95.
out-of-patience employee into a settlement for less than his claim is actually worth.\footnote{165}

The solution is either to improve the level of medical science or legislatively lower the burden of proof. Since little can be done about the former, the legislature, if it is willing to accept any proposed solution at all, must accept the latter one. There are a few alternatives available: (1) lower the burden of proof of work-relatedness for all diseases and injuries (assuming a consolidated system); (2) lower the burden of proof of work-relatedness for a schedule of certain disease and injuries; or (3) create rebuttable presumptions of work-relatedness where statistical evidence will support such a presumption.

The issue behind these alternatives is how much error should be tolerated to facilitate recovery by deserving workers. If any of the above alternatives are chosen, accuracy would not be lost; it would only be shifted from not paying some who deserve to paying some who do not deserve. One thing is certain: the legislature should not do anything to encourage more contested cases.

An across-the-board lowering of the burden of proof is the simplest and quickest way to make a change, if employers, insurers and consumers are willing to pay for the new claims. This matter of occupational disease is as much economical and political as it is legal.\footnote{166} From a gleaning of Montana case law, it is apparent that there has been a general fear on the part of the legislature, courts, and Workers' Compensation Division that if the burden of proof were lowered, occupational disease would turn into a general social insurance program. There is no evidence from any source to substantiate this fear.

Employers and insurers have long complained that if the costs of compensation or compensation insurance go any higher they will be unable to pass on the cost to consumers and will go out of business.\footnote{167} If this is so, they should produce supportive evidence. As yet they have not. If the costs of broader compensation are passed on in the cost of goods, consumers may not lose as much as one might think. Currently, two of the major sources of income for workers disabled from an occupational disease are consumer sup-

\footnote{165. Id.}  
\footnote{166. Prior to 1930 there was virtually no statutory coverage of occupational disease. After 1930, in the wake of a mine tragedy in West Virginia involving silicosis and the anticipated hundreds of millions of dollars in negligence recoveries, six states swiftly extended their workers' compensation coverage to include silicosis victims. Was the motivating force behind this legislation protection for employees or protection for employers? See Solomon, \textit{supra} note 162.}  
\footnote{167. Kutchins, \textit{supra} note 162.}
ported social security and consumer supported welfare. Fifty-three percent of these disabled workers receive social security benefits, while 16 percent receive welfare. Occupational diseases are costing the social security and welfare programs 2.2 billion dollars annually.\textsuperscript{168} If the occupational disease compensation system began paying claims that it was designed to pay, then diseased workers would not have to look to social security and welfare, and the taxpayer/consumer might even get a break in his taxes.

A schedule of certain diseases and injuries with a lowered burden of proof could be used with some effectiveness. Even if the legislature did not want to consolidate occupational disease with workers' compensation, this alternative could be used to lower the burden of proof of work-relatedness for a host of diseases which have been studied accurately in terms of cause and effect. At least part of the problem could be alleviated. One drawback to this alternative, however, is that the employee who needs more benefit of the doubt than anyone, the employee who has a rare unstudied disease, will not receive the legal boost he needs.

The other alternative is to use rebuttable presumptions created either by the legislature or by the Workers' Compensation Division pursuant to legislative guidelines. Where statistical or other types of data would support a work-disease connection, a presumption of work-relatedness could be utilized in the absence of contrary proof.\textsuperscript{169} Courts have traditionally balked at such presumptions, insisting that each claimant prove his own case.\textsuperscript{170} If this attitude persists, however, few occupational disease claimants will ever receive compensation.

A proof-by-presumption system would greatly aid the claimants but would cause innumerable headaches for the body creating the presumptions and the body applying them. Two problems are paramount. First, what degree of work-relatedness will suffice to support a presumption? Second, how broadly or narrowly should the presumptions be applied? For example, will a national study showing that 70 percent of the workers in a given industry contracted a certain disease support a presumption that, in a particular industrial plant in Montana, every worker contracting that disease has a work-related disease? There are other problems as well. What procedure should be used to decide the particular statistical

\textsuperscript{168} Interim Report, supra note 95.
\textsuperscript{169} Note, Compensating Victims of Occupational Disease, 93 Harv. L. Rev. 916 (1980).
\textsuperscript{170} Tilevitz, Judicial Attitudes Toward Legal and Scientific Proof of Cancer Causation, 3 Colum. J. of Envt'L. L. 344 (1976).
study to rely on? Can a company's own study be utilized? If the legislature were to choose the proof-by-presumption alternative, it would be best to let the Workers' Compensation Division draw up the details.

2. Statute of Limitations

The statute of limitations for occupational disease claims, MCA § 39-72-403 (1981), prohibits any claim from being brought more than "3 years after the last day upon which the claimant or the deceased employee actually worked for the employer against whom compensation is claimed." The unfairness of this statute is easily demonstrated. If an employee comes in contact with a highly carcinogenic compound on his last day of work, but the cancer does not manifest itself for 10 years, the employee will have no claim. The difficulty with this statute of limitations then, is not how long it runs, but when it begins to run. Many occupational diseases, especially cancer, have longer latency periods than this statute of limitations will account for. For example, asbestosis, a form of lung cancer, has a latency period of 10 to 25 years.171 Other cancers have latency periods of up to 35 years.172 Early diagnosis is rarely possible in cancer cases except in terms of change in statistical risk.173 Since there are thousands of toxic and carcinogenic chemicals now in commercial production and use,174 which may lead to a myriad of diseases, it is difficult to estimate how many potential claimants in Montana have not even filed a claim because of the statute of limitations. If the occupational disease compensation system is ever to achieve its purpose, this statute of limitations will have to be changed.

The legislature has two good alternatives. One possibility is to begin the running of the statute either on the date the employee discovers his disease or should have by "reasonable man" standards, or on the date of disablement, whichever comes first.175 This is a slight improvement over the current statute, although it still

171. 5B LAW. MED. CYCLOPEDIA § 38.46(h) (1980).
172. GRAY, supra note 114, § 72.40. Some specific carcinogens and their latency periods are: arsenic, 18 years; tar, 20-24 years; creosote oil, 25 years; mineral oil, 21-28 years; crude paraffin oil, 15-18 years; solar radiation, 20-30 years; chromates, 15 years; aromatic amines, 11-15 years. 5B LAW. MED. CYCLOPEDIA § 38.46(h) (1980).
174. There are now 30,000 chemicals in commercial production: 16,000 have toxic components, and 1,500 are suspected carcinogens. 13 A. FRANK, COURTROOM MED. § 16.00 (1981).
does not give that much benefit to employees since diagnosis of work-relatedness may not come until after years of continued symptoms.

A better choice would be to begin the running of the statute on the date the employee discovers, or reasonably could be expected to discover, the occupational nature of his disease. Professor Larson, a distinguished authority on occupational disease, favors this approach, and courts from several states have utilized it. This alternative accommodates all the rights that any employee, self-insured employer, or insurer can reasonably expect. In an occupational disease situation, one reason that a statute of limitations exists is to protect self-insured employers or insurers from unnecessarily delayed liability. However, a delay in filing an occupational disease claim where the disease has a long latency period can hardly be labeled unnecessary. If it is necessary for the employee to wait for years to discover his disease, then it is not unnecessary for employers or insurers to wait for years to discover their liability. Of employees, employers and insurers, it is employers and insurers who should be on the alert for potential claims since government regulation of toxic substances would act as some sort of notice to them of potential future liability.

D. Conclusion

Since there is no medically definable, logical or consistent difference between a disease and an injury, the occupational disease compensation system and the workers’ compensation system should be consolidated. This change, of itself, may not bring compensation to more claimants, but it will smooth over some of the difficulties confronting claimants, attorneys, judges and state administrators in using these compensation systems which were originally designed to be so simple that no attorneys would be needed. The legislature should also lower the burden of proof of work-relatedness, at least for some diseases, to match the current level of medical science. Claimants with genuinely meritorious claims should not be required to prove the impossible. As a further mea-

176. Larson, supra note 1, § 78.00.
sure, the statute of limitations for disease should be changed so that it begins to run from the date the employee discovers the occupational nature of his disease. If industry is ever to bear the blood of its workmen, then the Montana legislature will have to realize that there is more to bodily injury and disease than meets the eye.