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# Workmen's Compensation -- What Is the Range of Compensable Consequences of A Work-Related Injury?

C. H. Pope Jr.

A determination that the retired employees in this case are covered by the Act and that their benefits are mandatory subjects of bargaining raises quite a few questions that neither the Board nor the court has answered. For example; does the principle apply to all industrial pensioners or only to those pensioned pursuant to a collectively bargained contract; will pensioners now be allowed to participate in certification elections, and, if so, to what extent; may the parties bargain for a decrease in benefits, and may the employer decrease them if there is an impasse in bargaining? No reason appears why these questions must be settled before they arise in an actual case and, thus, the existence of these and other questions should not prevent affirmance of the Board's decision.

The court set forth no convincing arguments that the Board's decision will not effectuate the policies of the Act unless one accepts the premise that retirees were never intended to be protected by the Act. It is difficult to say that the Board's position is unreasonable or even unsupported by substantial evidence. Therefore, in a close case such as this the court should defer to the policy determinations of the Board. If the Board has acted contrary to the will of Congress, Congress has the power to overrule the Board.

GEORGE S. KING, JR.

## Workmen's Compensation—What Is the Range of Compensable Consequences of A Work-Related Injury?

The North Carolina Court of Appeals in *Starr v. Charlotte Paper Co.*[1] recently considered the extent to which an employer, liable for the first injury, may be held accountable under the North Carolina Workmen's Compensation Act for secondary injuries subsequently incurred by its former employee. On October 8, 1963, while employed by the defendant, Starr suffered a spinal injury causing total paralysis from the waist down. In lieu of weekly compensation benefits, Starr settled with the employer for thirty-five thousand dollars. The North Carolina Industrial Commission entered an order approving the settlement with the exception that it was not in satisfaction of subsequent hospital and nursing expenses incurred as a result of the injury.

Due to his condition, Starr could move about only with the aid of a wheelchair and had frequent muscle spasms in his legs. On March 17,

[1] 8 N.C. App. 604, 175 S.E.2d 342, *cert. denied*, 277 N.C. 112, — S.E.2d — (1970).

1969, six years after the first injury, he was awakened by muscle spasms which he managed to quiet by massaging his legs. The claimant then lit a cigarette. When his legs again began to contract, he placed the cigarette in an ash tray on his wheelchair beside the bed and again massaged his legs. After he drifted off to sleep, his sheets came into contact with the cigarette and began smoldering. Starr was finally awakened by the smell of smoke but by this time had suffered second and third degree burns over the lower half of his body, which resulted in his being hospitalized for seventy-three days.

The claimant brought a claim against his former employer for the hospital expenses and was awarded compensation by the Industrial Commission. Charlotte Paper Co. appealed, charging that the previous accident was not the proximate cause of the claimant's subsequent injuries, but that they were proximately caused by his smoking in bed. In affirming the award, the North Carolina Court of Appeals relied on a liberal construction of the workmen's compensation act to find that the injury "arose out of" the employment.[2] Noting that the claimant's failure to properly extinguish the cigarette was a "simple act of forgetfulness,"[3] the court stated that recovery was allowed even when the employment was not the "sole causative force"[4] of an injury. In addition, the court held that every direct and natural consequence of a prior injury is compensable unless there has been an intervening cause attributable to "claimant's own intentional conduct."[5] Any negligence on the part of the claimant not amounting to intentional conduct was thus disregarded.[6]

The North Carolina Workmen's Compensation Act allows recovery for "injuries by accident arising out of and in the course of employments."[7] "Arising out of" as used in the act requires that the injury have its origin in the employment,[8] be traceable to the employment,[9] or spring from the employment.[10] Thus, an injury occurring subsequent in time to

[2] *Id.* at 609-10, 175 S.E.2d at 346.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 611, 175 S.E.2d at 347.
[6] *Id.*
[7] N.C. GEN. STAT. § 97-2(6) (1965).
[8] Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 91, 63 S.E.2d 173, 175 (1951).
[9] Horn v. Sandhill Furn. Co., 245 N.C. 173, 176, 95 S.E.2d 521, 523 (1956); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 564, 82 S.E.2d 693, 694 (1954); Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 368, 163 S.E.2d 17, 20 (1968).
[10] Perry v. American Bakeries Co., 262 N.C. 272, 273, 136 S.E.2d 643, 645 (1964).

the prior compensable injury would have its origin in the employment if there were "some causal relation"[11] between the two injuries. One cause of Starr's burns was the muscle spasms that awakened him and arguably led to his failure to extinguish the cigarette. Furthermore, he would have been awakened by the burning of his flesh had he any feeling in his legs.[12] Thus, there was "some causal relation" between the injury and the prior compensable injury, so that the burns could be said to have "arisen out of the employment."

The real difficulty of analysis in statutory terms is encountered when the "in the course of the employment" inquiry is made. "In the course of the employment" refers to the time, place, and circumstances of the accident.[13] Because secondary injuries of the type under consideration here do not occur in the job context, some courts limit their inquiry to a determination of whether the injury arose out of the employment,[14] indicating that all that is necessary for recovery for subsequent injuries is caustion in the but-for sense. "So long as the original injury operates even in part as a contributing factor [of the second injury] it establishes liability."[15] Using this language, recovery for the subsequent swimming death of a quadruple amputee could be allowed if his limbs had been lost as a result of a prior compensable injury. A man with a broken hand could recover for re-injury incurred as a result of a boxing match,[16] or one suffering from vertigo as a result of a prior injury could recover for subsequently falling off a ladder.[17] If some inquiry in addition to "arising out of the employment" is not made, recovery for the off-the-job injury will be broader than for the original injury,[18] and workmen's compensation

[11] *Id.*

[12] 8 N.C. App. at 609, 175 S.E.2d at 346.

[13] Harless v. Flynn, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1952).

[14] *See, e.g.*, State Comp. Ins. Fund v. Industrial Acc. Comm'n, 1 Cal. Rptr. 73, 176 Cal. App. 2d 862 (1959); Colvin v. Emmons & Whitehead, 216 App. Div. 577, 215 N.Y.S. 562 (Sup. Ct. 1926).

[15] State Comp. Ins. Fund v. Industrial Acc. Comm'n, 176 Cal. App. 2d 862, —, 1 Cal. Rptr. 73, 78 (1959).

[16] 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 13.11, at 192.65-.66 (1968) [hereinafter cited as LARSON].

[17] Colvin v. Emmons & Whitehead, 216 App. Div. 577, 215 N.Y.S. 562 (Sup. Ct. 1926). *See also* Note, *Workman's Compensation: Arising out of Employment: Chain of Causation between Compensable Injury and Subsequent Injury, Aggravation or Reinjury: Negligence of Workman as Independent Intervening Cause: Swanson v. Williams & Co., 278 App. Div. 477, 106 N.Y.S.2d 61 (3d Dep't 1951), aff'd without opinion, 304 N.Y. 624, 107 N.E.2d 96 (1952)*, 38 CORNELL L.Q. 99 (1952).

[18] Recovery is not allowed for the original injury if it was occasioned by intoxication or if it was willfully inflicted. If "arising out of the employment" is the only

will be extended into the proscribed field of general health and accident insurance.[19]

Due to the nonapplicability of the "in the course of the employment" inquiry to subsequent off-the-job injuries and the recognition that all secondary injuries were not intended to be compensable,[20] courts have sought some concept to limit the employer's liability for a causally related injury.[21] Accordingly, the North Carolina Court of Appeals, and most other courts considering the problem, require that in addition to "some causal relation" the subsequent injury be proximately caused by the prior compensable injury.[22] "The proximate cause doctrine . . . requires that the original injury be one of the direct and natural causes of the subsequent injury,"[23] or compensation will be denied.[24]

Thus, there is a reentry of common law proximate cause into the formula for recovery under the workmen's compensation acts. One element of proximate causation is foreseeability. Foreseeability was eliminated by the North Carolina act as a requirement for compensation for on-the-job injuries[25] because it is

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requirement for compensability for a subsequent injury, recovery might be allowed where it was in part occasioned by the employee's intoxication under a literal application of this language. N.C. GEN. STAT. § 97-12 (1965).

[19] Workmen's Compensation Acts are not to be construed so liberally as to provide general health and accident insurance. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 41, 167 S.E.2d 790, 792-93 (1969). *See generally* Note, 38 CORNELL L.Q., *supra* note 17, at 103-04.

[20] *See* authorities cited note 19 *supra.*

[21] Arguably, there are several provisions in the North Carolina Workmen's Compensation Act that evidence a legislative intent that subsequent injuries not be compensable at all. *See* N.C. GEN. STAT. § 97-24(a) (1965) (all claims are barred unless filed within two years of a compensable accident); § 97-24(c) (1965) (all records of the Industrial Commission can be destroyed five years after all reports are filed); § 97-47 (1965) (an employee can move for review of the award if there has been a change in his condition). *See also* Lee v. Roses 5-10-25¢ Stores, 205 N.C. 310, 171 S.E. 87 (1953).

[22] *See, e.g.*, Great A&P Tea Co. v. Hill, 201 Md. 630, 636, 95 A.2d 84, 87 (1953); Dickerson v. Essex Co., 2 App. Div. 2d 516, —, 157 N.Y.S.2d 94, 96 (Sup. Ct. 1956); Gower v. Mackes, 184 Pa. Super. 41, 45-46, 132 A.2d 880, 882 (1957).

[23] 8 N.C. App. at 610, 175 S.E.2d at 347. *See also* Coble v. Player Realty & Constr. Co., North Carolina Industrial Acc. Comm'n Docket No. A-7243 (1951).

[24] *See, e.g.*, Yarbrough v. Polar Ice & Fuel Co., 118 Ind. App. 321, 79 N.E.2d 422 (1948); Adkins v. Rives Plating Corp., 338 Mich. 265, 61 N.W.2d 117 (1953); Sullivan v. B&A Constr., Inc., 307 N.Y. 161, 120 N.E.2d 694 (1954). *See also* Note, *Workmen's Compensation—Accident or Injury and Consequences Thereof—Subsequent Injuries*, 19 U. CIN. L. REV. 304, 305 (1950).

[25] North Carolina does not require that the original injury be foreseeable. *See, e.g.*, Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963); Withers v. Black, 230 N.C. 428, 433, 53 S.E.2d 668, 672 (1949); Ashley v. F-W

> out of place in compensation law because, as developed in tort law, it [is] a concept which [is] . . . thoroughly suffused with the idea of fault; that is, it [is] a theory of causation designed to bring about a just result when starting from an act containing some element of fault. The primary test of legal cause in the United States is foreseeability . . . . [b]ut foreseeability has no relevance if one is not interested in the culpability of the actor's conduct.[26]

Since the fault of the employer is equally irrelevant in the context of secondary injuries, common law foreseeability has no place in the determination of compensability. With the dismissal of foreseeability, proximate cause is limited to meaning the absence of an intervening cause.[27]

Once the doctrine of intervening cause raises its head, the employee's negligence as an intervening cause must be reckoned with even though the workmen's compensation acts eliminated any inquiry into negligence in the formula for recovery. "[N]ot even gross negligence is [to be] a defense to a compensation claim."[28] Courts have avoided this seemingly anomalous situation by asserting that the inquiry into employee negligence is not made to bar recovery for contributory negligence but to determine the legal cause of the claimant's injury—his own intervening negligence or the prior injury.[29] Accordingly, most courts have required something more than mere negligence by the employee to break the chain of causation and relieve the employer of liability.[30] What constitutes mere negligence is determinative of liability in most subsequent injury cases. Thus, the court of appeals in *Starr* held that Starr's failure to extinguish his cigarette was a "simple act of forgetfulness . . . insufficient to break the chain of causation between the original injury and the burns sustained."[31]

The assertion that an inquiry into the claimant's negligence is not made to deny recovery for contributory negligence but to determine if the negligence is the legal cause of the injury provides a weak justification

Chevrolet Co., 222 N.C. 25, 27, 21 S.E.2d 834, 835 (1942). *See also* 5 J. STRONG, NORTH CAROLINA INDEX 2D *Master & Servant* § 55, at 399-400 (1968).

[26] Larson, *Range of Compensable Consequences in Workman's Compensation*, 21 HASTINGS L.J. 609, 610 (1970).

[27] Note, 19 U. CIN. L. REV., *supra* note 24, at 305.

[28] Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962).

[29] Note, 38 CORNELL L.Q., *supra* note 17, at 101.

[30] 8 N.C. App. at 610, 175 S.E.2d at 346 (simple act of forgetfullness). *Accord*, Swanson v. Williams & Co., 278 App. Div. 477, —, 106 N.Y.S.2d 61, 66 (Sup. Ct. 1951) (carelessness or error in judgment); Anderson v. Industrial Ins. Comm'n, 116 Wash. 421, 423, 199 P. 747, 748 (1921) (imprudence). *See generally*, LARSON § 13.12, at 192.76. *But see* Note, 30 TENN. L. REV. 322, 324 (1963).

[31] 8 N.C. App. at 609-10, 175 S.E.2d at 346.

for insinuating negligence back into the formula for recovery. If the question as to whether the claimant's negligence was an intervening or only a contributing cause is a guide to recovery, why should the same inquiry not be made in regard to on-the-job injuries? The court, if it found the claimant's negligence an intervening cause, could report that it was denying recovery because the negligence and not the job caused the injury. However, as we have seen, even gross intervening negligence will not prevent recovery for one-the-job injuries.[32]

If the concept of proximate causation cannot be tested by inquiry into foreseeability or by the use of intervening causation,[33] it is useless in defining the situations where compensation for causally related subsequent injuries should be allowed.[34] Nevertheless, it could hardly be said that the act was intended to compensate the employee for every secondary injury suffered due to the interaction of the previous injury and subsequent conduct and events.[35] The North Carolina Workmen's Compensation Act relieves the employer from responsibility for the *original* injury if it was occasioned by the employee's intoxication or if he willfully inflicted the injury on himself.[36] Arguably then, some limitation should be placed on the employer's liability for a subsequent injury even where there is some causal relation to the prior injury. For example, if an employee became a quadruple amputee as a result of a prior compensable injury and later attempted to swim the English Channel, it would be ludicrous to hold the employer liable for his drowning death.

If neither the traditional "in the course of the employment" inquiry nor the concept of proximate cause is fitted to determining the range of compensable consequences of a prior, causally related compensable injury, how is the court to define those situations where such injuries will be

[32] *See, e.g.*, Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962); Howell v. Standard Ice & Fuel Co., 226 N.C. 730, 732, 40 S.E.2d 197, 198 (1946).

[33] This is not to imply that foreseeability and intervening causation are preclusive tests of proximate cause. They are, however, the traditonal tests used to insert some certainty into the concept. Because most courts rely on these terms, they will be relied on here.

[34] The North Carolina Workmen's Compensation Act does not speak of proximate cause as a test of liability. Conjecturally, it might have been intentionally avoided. For that reason alone, the term should be avoided in workmen's compensation cases.

[35] "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

[36] N.C. GEN. STAT. § 97-12 (1965).

compensable? Professor Larson has been one of the few commentators to address himself to this problem.[37] His solution is to divide all employee conduct occurring subsequent to the first compensable injury into two categories: that necessarily and reasonably undertaken *because of* the prior injury[38] and that undertaken for other reasons.[39] The former category is delineated as "quasi [in the] course of [the] employment"[40] activity, the latter, non-"quasi [in the] course of." The range of compensable consequences for "quasi in the course of" activity extends to any subsequent injury not incurred as a result of the claimant's intentional conduct.[41] Thus, there would be recovery for injuries incurred during a trip to the doctor's office for treatment of a prior injury even if the claimant was negligent in some aspect of the trip. If the activity in which the claimant was engaged at the time of the second injury were not undertaken because of the prior injury, recovery would be denied by the Larson rule if there were any culpability greater than "mere" negligence.[42] Professor Larson's use of intentional and negligent conduct as determining the outer limits of the range of compensable consequences for a work-related injury still focuses the court's attention on intervening and thus proximate causation as a limitation on recovery. Such an analysis is subject to the same criticism as a proximate cause inquiry unrefined by "quasi course of" language.[43]

Most courts have recognized that industry should bear the burden for secondary injuries where the causal relation is sufficiently strong[44] and where the employee was not injured while engaged in activity highly dangerous for one in his condition.[45] Compensation for second injuries is denied where there is no proof of any causal relation or where claimant was reinjured while engaged in conduct highly unreasonable for one in his condition.[46] Denial of compensation in the first situation can best be

[37] *See* 1 LARSON §§ 13.00-.12.
[38] *Id.*
[39] *Id.* § 13.11, at 192.70-71.
[40] *Id.* at 192.68.
[41] *Id.*
[42] Professor Larson relates that it takes something more than mere carelessness on the part of the employee to relieve the employer of liability even though the employee is outside the "quasi-course" of the employment. *Id.* at 192.70-.71.
[43] *See* pp. 587-88 *supra.*
[44] *Cf.* 1 LARSON § 13.11, at 192.67.
[45] Adkins v. Rives Plating Corp., 338 Mich. 265, 272, 61 N.W.2d 117, 120 (1953); Jones v. Huey, 210 Tenn. 162, 167, 357 S.W.2d 47, 49 (1962); McDougle v. Department of Labor & Indus., 64 Wash. 2d 640, 644, 393 P.2d 631, 635 (1964).
[46] *See* authorities cited note 45 *supra.*

explained in terms of lack of sufficient causal relation to hold that the injury arose out of the employment. The courts usually deny liability in the latter situation after a determination that the activity in which the claimant was engaged when injured was not a normal one for a person in his condition. In proximate cause terms the activity would be called intervening negligence, and compensation would therefore be denied. However, instead of couching the inquiry in terms of proximate causation, less confusion and more consistent results[47] would be achieved if the limitation were versed in the very terms by which it is reached, *i.e.*, was the activity a normal one for a person placed in plaintiff's physical and mental condition by the prior compensable injury.[48] This inquiry may seem a return to the concept of foreseeability, condemned in workmen's compensation law;[49] however, it does not require that the claimants's second injury be foreseen by either him or the employer. Thus to be compensable, the injury must occur during participation in activities that, viewed in retrospect, are normal and expected and there must be some causal relation between the two injuries.

The suggested method of limiting recovery would eliminate the confusion[50] resulting from an analysis based on proximate cause although the end result in terms of liability may be the same. Proximate cause is essentially a policy determination as to whether legal responsibility

[47] The differences as to what the term "proximate cause" means to different courts is shown by the wide divergence in results on similar fact situations in workmen's compensation cases. *Compare* Wallace v. Judd Brown Constr. Co., 269 Minn. 455, 131 N.W.2d 540 (1964), *with* Prentice v. Weeks, 239 App. Div. 227, 267 N.Y.S. 849 (Sup. Ct.), *aff'd*, 264 N.Y. 507, 191 N.E. 538 (1933); Adkins v. Rives Plating Corp., 338 Mich. 265, 61 N.W.2d 117 (1953), *with* Colvin v. Emmons & Whitehead, 216 App. Div. 577, 215 N.Y.S. 562 (Sup. Ct. 1926); Fischer v. R. Hoe & Co., 224 App. Div. 335, 230 N.Y.S. 755 (Sup. Ct. 1928), *with* Whiting-Mead Commercial Co. v. Industrial Acc. Comm'n, 178 Cal. 505, 173 P. 1105 (1918).

[48] This test is closely akin to the "direct and natural result" of a prior compensable injury formulation announced in *Starr*. It is superior, however, because it diverts the court from all mention of proximate cause.

[49] *See* pp. 586-87 *supra*.

[50] The confusion caused the court by use of the concept of proximate causation as a limitation on recovery, even when the test is couched in terms of "quasi-course" of the employment, can be seen in *Starr*. There, the court cited Larson's treatise for the proposition that a claimant is allowed recovery for all consequences of his prior injury unless they occurred as a result of his intentional conduct. 8 N.C. App. at 611, 175 S.E.2d at 347. Accordingly, Starr's smoking in bed was held not to be an intervening cause of the burns. Professor Larson, however, would require that the claimant's smoking in bed be an activity *reasonably* and necessarily undertaken because of the prior compensable injury or anything greater than the claimant's mere negligence would bar recovery. 1 Larsen § 13.12, at 192.76. The court, however, made no finding that Starr's smoking in bed was reasonable or necessary.

should be imposed on one person for injuries incurred by another.[51] Rather than making this policy determination by using proximate cause with its myriad of meanings[52] and connotation of fault,[53] the court should ascertain whether the injury had sufficient causal relation to the prior injury and subsequently occurred in the course of activities normally expected to be undertaken by one in the claimant's condition.[54] Thus, in *Starr*, it might be said that smoking in bed was a normal activity for a paraplegic. Furthermore it is to be expected that an injured employee will engage in a certain amount of careless or even negligent activity. It is only when he embarks on a course of conduct that is highly unreasonable for one in his condition that he departs from the course of normal activities.

Even though, arguably, *Starr* was correctly decided,[55] the court should not use a highly technical and amorphous term such as proximate cause to determine the range of compensable consequences in workmen's compensation cases. If the use of proximate cause is not abandoned, the doctrines of tort law and workmen's compensation law will eventually fuse even though the avoidance of the common law concepts was one of the main justifications for the original passage of the workmen's compensation acts.[56]

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[51] *Cf.* W. PROSSER, LAW OF TORTS § 49, at 282 (3d ed. 1964).
[52] *See* note 47 *supra.*
[53] *See* note 26 *supra.*
[54] "Normal and expected" are used here not as a suggestion that foreseeability is required but in the sense that in retrospect the claimant's conduct is not surprising.
[55] Whether Starr's recovery should have been allowed hinges on whether smoking in bed was a normal and expected activity for a person subject to having muscle spasms. A paraplegic could not be expected to get out of bed every time he smoked a cigarette.
[56] Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 726, 153 S.E. 266, 268 (1930).