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WORKMEN'S COMPENSATION: AN ANALYSIS OF NEBRASKA'S REVISED "ACCIDENT" REQUIREMENT

John M. Gradwohl*

I.

THE BACKGROUND

The Nebraska workmen's compensation statute, if applicable to the parties, covers "every case of injury or death caused by accident or occupational disease arising out of and in the course of employment." From adoption of the statute in 1913, the term "accident" was defined to "mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."

For the first twenty years under this statute, the Nebraska Supreme Court, in line with the precedents under the English Workmen's Compensation Act of 1897 from which the "accident" requirement was derived, held that an unexpected internal injury was compensable whether or not the injury was caused by an external event. Since 1941, the Court consistently construed the phrase "unexpected or unforeseen event" to require an event external to the body, some sort of a slip, trip or fall, or exertion more strenuous than that ordinarily incident to the employment.

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1 NEB. REV. STAT. § 48-109 (Reissue 1960) ("except accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151").


3 See cases collected in Gradwohl, Nebraska Workmen's Compensation for Aggravation of Pre-Existing Infirmities By Exertion or Strain, 41 Neb. L. Rev. 101, 112-16 (1961).

As a result, some employees injured from work-connected strain or exertion in performing their ordinary duties were not entitled to workmen's compensation.

II.
A SUMMARY OF L.B. 497

The effect of the 1963 amendments can be briefly, but fully, summarized in one sentence: The only substantive change made in previous Nebraska workmen's compensation law was to eliminate the judicial interpretation that an "unexpected or unforeseen event" meant only an "external" event.

The statute now clearly provides that an unexpected or unforeseen "injury" is compensable. In other words, where Nebraska formerly awarded compensation only if there was an unexpected or unforeseen "cause" of injury, compensation will now be paid where there is an unexpected or unforeseen injury, regardless of whether the "cause" of injury is unexpected or unforeseen.

This has had the effect of completely overruling, legislatively, a few Nebraska cases and portions of many more decisions. While there were no other changes in the substantive provisions of the Nebraska accident definition, the 1963 amendments will certainly serve to focus additional attention on the previous requirements pertaining to "happening suddenly and violently," "producing at the time objective symptoms of an injury," and the burden of factual proof.

The other material added by the 1963 bill merely codifies rules which had become well settled and consistently applied through numerous judicial decisions. The accident definition now contains some of the burden of factual proof rules which rested previously wholly on judicial decision. The definition of "injury" has been amended to include one aspect of the judicially developed rules concerning aggravation of a pre-existing infirmity. No substantive or procedural changes were made or intended by these amendments.

the amount of "unusual exertion" present as an "unexpected or unforeseen event," but, factually, these cases may also have involved another external event. Knaggs v. City of Lexington, 171 Neb. 135, 105 N.W.2d 727 (1960); Anderson v. Cowger, 158 Neb. 772, 65 N.W.2d 51 (1954). Of special difficulty was a determination of the point at which a "wobble, lurch or jerk," or some similar term, constituted an external event. Compare Gilbert v. Metropolitan Util. Dist., 158 Neb. 750, 57 N.W.2d 770 (1953), with Carranza v. Payne-Larson Furniture Co., 165 Neb. 352, 85 N.W.2d 694 (1959), Green v. Benson Transfer Co., supra, and Pruitt v. McMaken-Transp. Co., supra.
As amended, the statute provides: 5

The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen [event] injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.

The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in said employment.6 The terms shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition.

III.

"UNEXPECTED OR UNFORESEEN INJURY"

The dominant legislative intent behind enactment of L.B. 497 was to restore the original interpretation of the "accident" defini-
These early Nebraska cases allowed compensation for injuries from exertion or strain without regard to the severity of the exertion, if attributable to the employment. This was true whether or not the exertion was a part of the performance of the regular duties of the employee.

The opinion most representative of present Nebraska law would appear to be the 1917 decision in Manning v. Pomerene. A 63-year-old steam fitter's helper injured blood vessels in his brain or stomach while pushing his body against two steel "I" beams which protruded about three feet over the floor of a passageway. The exertion involved a "natural and expected" part of the employee's duties. There were "objective symptoms of an injury" at that time. The condition worsened for three days, when there was vomiting of blood. From the Court's opinion, it appears that "afterwards he had hiccoughs that lasted for about two weeks, and was very weak, and soon afterwards had a slight paralytic stroke that affected one arm and leg."

The Court affirmed a lifetime award for total-permanent disability. The opinion concluded that the claimant had sustained his burden of proof that there had in fact been an accident, and that the disability from which he suffered was a result of the accident rather than of a progressive arterio sclerosis. The "unforeseen or unexpected event" in the statutory definition of "accident" was the work-caused strain in attempting to push the steel beams. "The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen [sic] event happening suddenly."

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7 Statement of Judiciary Committee on L.B. 497, 73d Neb. Leg. Sess., May 22, 1963: "For the last two decades the Supreme Court has given a narrow interpretation of the type of injury which occurs from exertion on the part of the employee while doing work demanded by his employment. At one time the Nebraska court favored the more liberal rule which is law in a great majority of the other states; but in the last two decades our Supreme Court has construed, generally, that inner bodily injuries caused by exertion are not compensable unless the employee obtains such in connection with a slip, trip or fall. This narrow court interpretation does not do justice in many cases and is not in harmony with the majority of opinions in other states under workmen's compensation law."

8 101 Neb. 127, 162 N.W. 492 (1917).

9 Id. at 129, 162 N.W. at 493.

10 Id. at 130, 162 N.W. at 493.

11 Id. at 129, 162 N.W. 493.
Between 1917 and 1937, there were several other decisions allowing recovery for heat stroke and for strain from lifting in performing the ordinary duties of the employment. The significance of these holdings is that the injury was compensable whether or not it was a consequence of normal employment duties. In fact, an employee would probably be entitled to compensation even for a work caused injury from performing duties which were lighter or easier than those ordinarily required of him or than which the general public might be expected to perform. All injuries would appear to be "unexpected or unforeseen" other than "accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151."  

Although ordinary exertion or exposure will not normally be a factor in awarding workmen's compensation, it may still be a relevant factor in some situations in determining whether the employment did "in fact" cause the injury or whether the injury was one "arising out of and in the course of employment." In the "injury by the elements" cases, the Court has traditionally required as an element of employment connection that in order to be compensable, the employee must be subjected to a greater risk and hazard than is the public generally. The same result will be reached under the 1963 amendment either under the accident definition language, "in fact caused by the employment," or under "arising out of and in the course of employment."  

In 1962, the Florida court adopted a special exertion rule in "heart" cases even after a legislative amendment of the accident definition. Heart cases seem to have been the most difficult category of cases to decide factually with respect to employment and medical causation. To establish employment connection, not the presence of an accident, Florida judicially applies an unusual exertion test. This rule is employed only in heart cases; it does

14 NEB. REV. STAT. § 48-109 (Reissue 1960). Other than through the defense of willful negligence, the doctrine of assumption of risk appears to have finally been eliminated from the compensation statute.  
15 See note 3 supra, at 113-14 n.43.  
16 Victor Wine & Liquor, Inc. v. Beasley, 141 So. 2d 581, 587, 588-89 (Fla. 1962). After discussing the legislative revision codifying the previous judicial and legislative reversal of the slip, trip or fall rules, the opinion on
not apply to other "internal failure" cases. Other states have also employed special exertion rules in heart cases as an element of proof of employment or medical causation.\(^7\)

L.B. 497 as originally introduced was copied from the amended Florida statute.\(^8\) While the Nebraska bill was later amended by the legislature, it still appears possible that the Nebraska Court could adopt a similar judicial rule for proof of employment connection in heart cases.

IV.

CASES LEGISLATIVELY OVERRULED

Only a few Nebraska Supreme Court decisions have been legislatively overruled in the sense that the Court would now be compelled to reach an opposite result if the case were tried under the

rehearing states: "It is therefore settled beyond question in this state that an internal failure, such as a strained muscle, ruptured disc, 'snapped' knee-cap, and the like, brought about by exertion in the performance of the regular or usual duties of the employment, may be found to be an injury 'by accident,' without the necessity of showing that such injury was preceded by some incident, such as a slip, fall or blow. . . . In the so-called 'exposure' cases, this court has stressed that, to entitle the employee to compensation, he must have been subjected to more than the ordinary hazards confronting people generally; but we have found no case in which it has been held that the ill effects of the exposure must occur suddenly and be immediately related to an identifiable incident . . . When disabling heart attacks are involved and where such heart conditions are precipitated by work-connected exertion affecting a pre-existing non-disabling heart disease, said injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing. Thus, if there is competent substantial medical testimony, consistent with logic and reason, that the strain and exertion of a specifically identified effort, over and above the routine of the job, combined with a pre-existing non-disabling heart disease to produce death or disability sooner than it would otherwise have occurred from the normal progression of the disease, the employee has a right to some compensation." See Friendly Frost Used Appliances v. Reiser, 152 So. 2d 721 (Fla. 1963) (lifting heavy refrigerators routine to employment). See also Diamelio v. Royal Castle, 148 So. 2d 8 (Fla. 1962) (epileptic seizure due to substantial heat at work held compensable). Compare City of Boca Raton v. Sellers, 148 So. 2d 25 (Fla. 1962), with Eschenbrenner v. Employers Mut. Cas. Co., 165 Neb. 32, 84 N.W.2d 169 (1957). Perhaps Nebraska police officers are just expected to be more heroic than Florida police officers.

\(^7\) See 1 Larson, Workmen's Compensation Law §§ 38.64, 38.64(a), 38.64(b), 38.73, 38.83 (1952). A number of states have special statutes for the compensability of hernias. Id. § 39.70.

\(^8\) Fla. Stat. § 440.02(19) (1961) ("ununexpected or unusual event or result").
1963 amendment. These cases involve situations in which the Court, after examining the evidence, has concluded affirmatively that the employee's injury was in fact caused by his employment, but since the employment-cause involved only ordinary exertion or strain, the injury was not compensable.

Two recent decisions illustrate the category of cases which have been entirely overruled. In Pruitt v. McMaken Transp. Co.,\(^1\) the Court apparently concluded that lifting an 80 to 85 pound box caused a back injury, but stated that since this exertion was ordinarily incident to the employment of a dock-worker, the injury was not compensable. In Green v. Benson Transfer Co.,\(^2\) a truck driver was lifting a 500 to 550 pound hide-a-bed with a fellow employee when the bed fell open and he sustained a hernia. The opinion acknowledged that the injury resulted from the employment, but denied compensation because "the shifting of the weight was usual and expected, and a common incident of the employment."\(^2\)

Other Nebraska decisions have been partially overruled to the extent of their utilization of the "ordinary exertion" or "slip, trip or fall" rules. Where the Court has concluded that the claimant failed to sustain the burden of proof that his injury was due to the exertion or strain of his employment,\(^2\) the decision has been overruled only to the extent the opinion may have gone on to employ alternative reasoning that even if shown to have been work-caused,

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\(^1\) 175 Neb. 477, 482, 122 N.W.2d 236, 240 (1963): "This appears to be a case where the exertion incident to his occupation resulted in the back difficulty. We are committed to the rule of law in this jurisdiction that mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident."

\(^2\) 173 Neb. 226, 113 N.W.2d 61 (1962).

\(^2\) Id. at 228, 113 N.W.2d at 62: "Under the evidence adduced, plaintiff's injury resulted from work incident to his employment. It falls within the rule announced in Jones v. Yankee Hill Brick Manufacturing Co., 161 Neb. 404, 73 N.W.2d 394, which is to the effect that mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the workmen's compensation law. In the instant case the incident claimed to be an accident was not only common to the employment but it was recognized as such when means were taken by use of a strap to limit the shifting of the weight in carrying the hide-a-bed."

\(^2\) E.g., Roccaforte v. State Furniture Co., 142 Neb. 768, 771, 7 N.W.2d 656, 659 (1943): "There is no evidence to show that the exertion or pressure was such as would be connected in any manner with the disease which he had. He might have lost the vision of his right eye without any exertion, or on any occasion, even in his sleep."
the injury would not have been compensable. Where the Court has declined to make a determination whether or not the employee's injury was employment-caused, the decision has been overruled only in its utilization of the ordinary exertion rules. In cases where it is not clear whether the Court was relying upon the ordinary exertion rules or upon a failure of the claimant to prove employment-cause, it is appropriate to assume only that the portion of the decision stating the ordinary exertion rules has been overruled. Similarly, where the decision rests both upon the ordinary exertion rules and another legal requirement, only that portion applying the ordinary exertion rules has been affected.

V.

"HAPPENING SUDDENLY AND VIOLENTLY"

WHAT MUST HAPPEN SUDDENLY AND VIOLENTLY?

The statute now defines "accident" as "an unexpected or unforeseen injury happening suddenly and violently." On its face, this language may seem ambiguous in that it can be taken literally to mean:

a. the employment-cause of injury must take place suddenly and violently;

b. the injury must manifest itself suddenly and violently;

c. either the employment-cause or injury-manifestation must happen suddenly and violently;

d. both the employment-cause and injury-manifestation must happen suddenly and violently, but there can be a time interval between the employment-cause and injury-manifestation;

e. all of the operative facts from employment-cause through injury-manifestation must happen suddenly and violently.

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23 E.g., Hladky v. Omaha Body & Equip. Co., 172 Neb. 197, 203, 109 N.W.2d 111, 114-15 (1961): "We do not think it is necessary for this court to decide which theory was correct. Whichever was true his condition was not caused by an accident within the meaning of the Workmen's Compensation Act. Neither was it caused by exertion which was greater than that ordinarily incident to the employment. Even if such ordinary exertion combined with a pre-existing disease produced disability, it is not under that act compensable.”

A closer examination of the whole statutory framework should show clearly, however, that, as before the 1963 amendment, the requirement of suddenness means only that the employment-cause of injury must take place suddenly and violently. Where an employee sustains the factual burden of proving an employment-caused injury from a single exertion or strain, the injury will have happened suddenly and violently even if it manifested itself gradually over an extended period of time. On the other hand, an injury which may be shown factually to have been caused by the employment gradually over an extended period of time will not be compensable even if it dramatically manifests itself instantaneously.

In this sense, "happening suddenly and violently" is being interpreted to mean "caused by the employment suddenly and violently." This seems wholly consistent with the section providing for the payment of compensation, to which the accident definition relates. That section states that "compensation shall be paid in every case of injury or death caused by accident or occupational disease arising out of and in the course of employment . . . ."

As a matter of underlying policy, the requirement of suddenly and violently serves to establish a definite time and place to which the injury is traceable. Locating the time and place within the employment carries out the purpose of placing the blood of the workman on the economic consumers of the products or services whose creation caused the injury. It also gives the employer a more adequate opportunity to defend against a specific factual allegation.

The overwhelming legislative purpose behind the 1963 amendment was to eliminate the arbitrary factual situations arising under the slip, trip or fall rules which preclude recovery for work injuries caused by ordinary exertion or strain. The main contention in this regard was that it made no sense to deny injured workmen medical or disability benefits merely because the form of the cause of his injury did not involve a slip, trip, fall, or other external event. The injured workman who can prove factually that his employment caused him injury should be entitled to compensation regardless of whether the injury involved an internal body failure or external cause.

Similarly, it makes no sense to predicate compensation upon whether the type of injury received by the employee is one which manifests itself slowly or suddenly. The injured workman who sus-

tains an injury which takes an extended period of time to manifest itself should be compensated along with the employee whose injury develops immediately.

While the same argument might be advanced with respect to injuries caused gradually as to injuries manifested gradually, there are strong policy and statutory grounds for distinguishing between them. These relate mainly to matters of fixing the time and place of the cause within the employment and giving an employer a meaningful opportunity to defend.

The statute also contains the language “producing at the time objective symptoms of an injury.” If “happening” relates to injury-manifestation, then the “producing” phrase is rendered meaningless. In any case of injury, there would by definition be “objective symptoms” of an injury. The opposite is not true, however. There can be objective symptoms of an injury without an actual injury at that time.\textsuperscript{26} The requirement of “objective symptoms at the time” tends to give notice to the injured employee, employer and potential witnesses that there may be a compensable injury, and thus bolsters the fundamental purpose of the accident requirement.

It is apparent that the 1963 Legislature felt that the statutory requirement of suddenness is significant. L.B. 498, which would have deleted the requirement was unanimously killed by the Judiciary Committee to which both bills were referred, and L.B. 497 ultimately reported out without deletion of this language.

The Nebraska decisions during the period when “unexpected or unforeseen event” meant either an internal body failure or an external event do not resolve this ambiguity, which also existed then. \textit{Manning v. Pomerene}\textsuperscript{27} stated broadly, “The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen [sic] event happening suddenly.” The paralytic stroke from which the employee claimed compensation was not brought about until more than two weeks later. But the snow blindness case, \textit{Hayes v. McMullen},\textsuperscript{28} contains an equally strong inference that it is injury-manifestation which must happen suddenly, stating, “[A] case of ‘snow blindness’ which is a condition that requires several hours to manifest itself...
and which, as in this case, did manifest itself by visible irritations during the day of exposure, is an accident, unexpected, unforeseen, happening suddenly and violently . . . ." The decisions from other states having comparable statutory language are equally inconclusive.

**How Rapidly Is "Suddenly and Violently?"**

The phrase "suddenly and violently" seems to have been applied as an entity relating to speed, without imposing an additional requirement of physical violence. At least, no reported decision in which the injury has happened "suddenly" has determined that the injury did not happen "violently." For example, a mental breakdown by an elevator operator trapped for thirty minutes with a dying man who was being crushed to death between floors was said to have happened "violently" within the meaning of the accident definition, even though it did not involve "violence to the physical structure of the body" under the definition of "injury."29

There are few Nebraska decisions pertaining to the time period which the Court might consider to be sudden. This requirement has been in the statute since its enactment in 1913. Similar language appears in the statutes of Alabama, Florida, Idaho, Louisiana, Missouri, Nevada and Washington.30 There is no indication that any of these other states have achieved a more definite concept of sudden-

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29 Bekeleski v. O. F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942).
30 Ala. Code tit. 26, § 262(i) (1958) ("unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time injury to the physical structure of the body by accidental means"); Fla. Stat. § 440.02(19) (1961) ("unexpected or unusual event or result, happening suddenly"); Idaho Code Ann. § 72-201 (1949) ("unexpected, undesigned, and untoward event, happening suddenly and connected with the industry in which it occurs, and which can be definitely located as to time when and place where it occurred, causing an injury"); La. Rev. Stat. § 23:1021(1) (1950) ("unexpected or unforeseen event happening suddenly or violently, with or without human fault and producing at the time objective symptoms of an injury"); Mo. Ann. Stat. § 287.020(2) (Supp. 1962) ("unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury"); Nev. Rev. Stat. § 616.020 (1961) ("unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury"); Wash. Rev. Code § 51.08.100 (1962) ("sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without"). The requirement of suddenness in an accident definition is believed to have originated in the Minnesota act of 1913. Minn. Laws c. 467, § 34(h), p. 693 (1913) ("unexpected or unforeseen
ness, or that factual determinations would be any more clear, than under the Nebraska cases discussed below. Certainly, the decisions in the other states have not attempted to provide either a black letter rule or a formula for making a determination whether an injury happened suddenly. The Nebraska decisions, although extremely few in number, may serve as a basis as to how the Nebraska Court might at least approach some categories of factual issues.

(a) The straw that breaks the worker’s back

A worker who, out of and in the course of his employment, lifts the straw which factually causes him a direct injury has been, and will continue to be, entitled to compensation based upon his total resulting physical condition. The change made by the 1963 legislation means that now the ordinary exertion of lifting the straw can be the basis of a compensable accident. The injury will no longer need to have been caused by an external event or a slip, trip or fall. There was no substantive change in the previous Nebraska rules concerning aggravation of a pre-existing infirmity.31

An employee is entitled to compensation for aggravation of a pre-existing infirmity whether the pre-existing condition was congenital, unrelated to any employment, related to previous employment, or related to the employment in which the aggravation occurred.32 Lifting the straw need not be the sort of activity which would have produced disability by itself were it not for the presence of the pre-existing infirmity. Full benefits are payable although the resulting disability is more severe than it would have been in the absence of the pre-existing impairment.

The statute now codifies the former rule that the resulting state of disability cannot be a natural progression of the pre-existing condition.33 This codification illustrates quite clearly the legislative

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31 One phase of the aggravation rules was codified. See note 33 infra.

32 See Gradwohl, Nebraska Workmen's Compensation for Aggravation of Pre-Existing Infirmities By Exertion or Strain, 41 Neb. L. Rev. 101, 102-04 (1961).

33 Neb. Rev. Stat. § 48-151(4), as amended by L.B. 497 73d Neb. Leg. Sess. (1963): “The terms [injury and personal injury] shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition.”

The Supreme Court of Nebraska previously stated: “When an
intention that the judicial rules concerning aggravation of a pre-existing infirmity would remain unchanged, since, without the judicial aggravation rules allowing compensation, the exception to the aggravation rules which was codified would be meaningless and unnecessary.

It will be extremely difficult factually to distinguish the straw which breaks the worker's back cases from those involving gradual deterioration. This will depend upon whether the claimant can demonstrate factually that something finally gave way. The determination will have to be made on a case by case basis whether the injury was the culmination of continuous erosion to the very end, or whether the claimant has established that his body, however far it may previously have been eroded, finally gave way suddenly.

For example, an Alabama worker was allowed compensation for a herniated disc from lifting bundles of fabric from a waist high bin, a task she had been performing for nearly twenty three years. She testified she had a "catch in her back" which felt as if needles had been stuck in it, and became nauseated and weak. But where the head of a femur in a janitor's leg deteriorated over a twenty three month period, recovery was denied because the evidence did not show a sudden happening at a specific time. Similarly, in Florida, a woman fruit packer of eight weeks was able to convince the court that her back "finally gave way," but other workers have not been able to prove sudden back injuries, especially where there was a previous history of back pain.

(b) Separately—sudden, substantial happenings (external or internal) which combine to produce disability

In Van Vleet v. Public Service Co., the Court allowed recovery where it concluded that a death on March 18th was due to encepha-

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36 Spivey v. Battaglia Fruit Co., 138 So. 2d 308 (Fla. 1962).
37 E.g., Martin Co. v. Carpenter, 132 So. 2d 400 (Fla. 1961).
38 111 Neb. 51, 195 N.W. 467 (1923).
litis caused by gassings in two separate accidents occurring the preceding November 1st and February 1st. On each of these occasions, there had been objective symptoms of an injury, although no injury.

As a theoretical proposition, the same result might be reached where the employee sustains ten, twenty, a hundred, or even thousands of such incidents over a much longer period of time. But as a practical matter, the aggravation of pre-existing infirmity rules might make any but the last occurrence irrelevant in virtually all cases. And, as the cases in the next subsection indicate, at some point, the Nebraska Court will not treat each minor impact as a separate accident.

A workable prediction of how this conflict can and should be resolved under the Nebraska statute, cases, and legislative intent is as follows: Where separately-sudden, substantial happenings (external or internal) arising out of and in the course of the employment combine factually to produce disability, the injury is compensable regardless of the time interval between the happenings. In determining whether a happening is substantial, all of the requirements of the accident definition other than manifestation of injury must be met. Of special and critical importance is that there be objective symptoms of injury at the time of each happening. As many of the happenings as individually meet all of the requirements of the accident definition other than injury-manifestation can be grouped together. If this combination of separate happenings would have produced disability either outright or under the aggravation of pre-existing infirmity rules, the injury is compensable.

(c) Gradual physical deterioration or disintegration (whether or not caused by a series of minor impacts)

In some cases, an employee may sustain an injury where there is no specific happening or happenings to which the injury can be traced. During a period of time involving the performance of employment duties, the employee's health may deteriorate or disintegrate to a point of disability.

If the employee can prove factually that his employment caused the deterioration, he will additionally be required to show that this happened suddenly. The legislative intent to eliminate the means of injury as a criterion for compensation should imply that as a legal rule, the suddenness requirement should be given the same interpretation whether the injury is caused by a gradual body failure or a series of minor physical impacts. The factual proof of employment connection may be easier where identifiable
impacts or external events are present. At least, this sort of proof showing a specific time and place within the employment where the injury was allegedly caused should have a greater persuasive effect. A determination of the maximum time period which can constitute "suddenly" under the statute should not, however, be dependent upon the method by which the injury was caused.

Before enactment of the occupational disease statute, the Court denied recovery for silicosis even though it noted that the injury may have been employment-caused "'drop by drop,' little by little, day after day, for weeks and months." The opinion cited with apparent disapproval a federal decision under Idaho law (which did not then contain the statutory requirement of suddenness) allowing compensation to a painter who became disabled from breathing poisonous gas fumes for a period of one week.

The Nebraska occupational disease statute was enacted in 1943. Although there is no requirement of suddenness with respect to occupational diseases, the Nebraska coverage is limited by the definition that occupational disease "shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." NEB. REV. STAT. § 48-151(3) (Reissue 1960).

The opinion cited with apparent disapproval a federal decision under Idaho law (which did not then contain the statutory requirement of suddenness) allowing compensation to a painter who became disabled from breathing poisonous gas fumes for a period of one week.
In Blair v. Omaha Ice & Cold Storage Co., an employee allegedly contracted sciatic rheumatism from being required to work part-time for about a week indoors cleaning a very warm boiler and then put to work part-time outside in dripping water and fifteen to eighteen degrees below zero weather for about a week. The Court concluded that there was no event which happened suddenly and violently and which at the time produced objective symptoms of an injury. And in Murray v. National Gypsum Co., compensation was denied to a 50-year-old lady rocket packer who claimed injuries to her shoulder and arm from the cumulative effect of repeated jars and strains over a six week period.

Hayes v. McMullen, after argument of the suddenness issue in the briefs of counsel, allowed compensation to an operator of a blade machine for snow blindness caused by exposure for several hours during a single workday. If the time period of a single work-

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42 102 Neb. 16, 165 N.W. 893 (1917). In addition to the requirement of suddenness, the disease or sickness cases are extremely difficult. The claimant must relate the illness to the employment as distinguished from possible nonemployment causes. See, e.g., Lang v. Gage County Elec. Co., 133 Neb. 388, 275 N.W. 462 (1937). Even where shown to relate to the employment, courts have split on whether infectious diseases are compensable accidents. For example, under statutes similar to Nebraska's, compare Pow v. Southern Constr. Co., 235 Ala. 580, 180 So. 288 (1938) with Costly v. City of Eveleth, 173 Minn. 564, 218 N.W. 126 (1928). See 1 Larson, WORKMEN'S COMPENSATION LAW § 40.30, at 586-89 n.56-57 (1952).

43 160 Neb. 463, 70 N.W.2d 394 (1955). For a similar decision intertwining the slip, trip, fall or abnormal strain rules with "happening suddenly" in a successive impact case, see Tines v. Brown Shoe Co., 290 S.W.2d 200 (Mo. Ct. App. 1956), apparently overruling Lovell v. Williams Bros., 50 S.W.2d 710 (Mo. Ct. App. 1932) (allowing compensation for injury caused by three or four days of gouging down on a spade in trimming bank of a ditch).

44 128 Neb. 432, 436, 259 N.W. 165, 167 (1935): "Was the injury brought about suddenly? If by 'sudden' is meant instantaneous or practically so, then it was not suddenly produced. The condition complained of was the reflection of ultra violet rays of sunlight off of bright snow, which condition would have to continue for several hours before it would manifest itself or become known to the person exposed. The condition of plaintiff manifested itself the same day. . . . We are therefore of the opinion that in a case of 'snow blindness,' which is a condition that requires several hours to manifest itself and is an unusual occurrence in this climate, and which, as in this case, did manifest itself by visible irritations during the day of exposure, is an accident, unexpected, unforeseen, happening suddenly and violently, and producing objective symptoms of injury to physical structures, within the meaning of the Workmen's Compensation Law of Nebraska."
day (which may have extended to twelve hours) is sudden for purposes of exposure to sunlight, then it would seem to be equally sudden where there is no active, external agent.

If the Nebraska decisions are read together, we might conclude that "happening suddenly" means caused by the employment during a single workday; or possibly caused by the employment over a period of time longer than a single workday, but not longer than a workweek. In this sense, "caused" implies both outright cause and aggravation of a pre-existing infirmity. An answer to fact situations involving two, three or four workdays will have to await judicial decision.

VI.
"PRODUCING AT THE TIME OBJECTIVE SYMPTOMS OF AN INJURY"

L.B. 497 made no change in the statutory requirement that there be objective symptoms of an injury. In a long line of cases, it has become settled that symptoms of pain and anguish, such as weakness or expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in body condition, may constitute objective symptoms of an injury.

As amended, however, the "producing" phrase modifies "injury" rather than "event." It states that accident means "an unexpected or unforeseen injury happening suddenly and violently... and producing at the time objective symptoms of an injury."

The requirement "producing at the time" has been in the Nebraska compensation law since its enactment in 1913. Its purpose is to help achieve the accident requirement's policy to require

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45 Theoretically, it should also be possible that so many of these gradual happenings as meet all of the requirements of the accident definition other than injury-manifestation can be grouped together with either or both (a) other gradual happenings meeting all of the requirements of the accident definition other than injury-manifestation, and (b) separately-sudden, substantial happenings meeting all of the requirements of the accident definition other than injury-manifestation. If any combination of these happenings would have produced disability either outright or under the aggravation of pre-existing infirmity rules, the injury is compensable.


tangible evidence of the time and place of injury within the employment.

Throughout the existence of the Nebraska compensation law, regardless of the shift in position of the Court on the slip, trip or fall rules, the phrase "producing at the time" has meant that the objective symptoms of an injury must have existed at the time of employment-cause, rather than injury-manifestation, if there was a difference in time. The opinion in Manning v. Pomerene\textsuperscript{48} establishes that the phrase "objective symptoms of an injury" has a broader meaning than the term "injury." The objective symptoms set out by the Court in that opinion related to the employment-cause of pushing the two steel "I" beams, although compensation was allowed for a paralytic stroke which did not manifest itself until about two weeks after the employment-cause.

L.B. 498, the alternative proposal to L.B. 497, would have deleted the objective symptoms requirement. This seems significant in demonstrating the legislative intent that "producing at the time" relates to employment-cause.\textsuperscript{49} Unless "producing at the time" pertains to employment-cause, there would be no reason for having the requirement in the statute. At the time an injury manifests itself, there would automatically seem to be objective symptoms of an injury, and the entire "producing" phrase would become meaningless.

The recent decision in Skalak v. County of Seward\textsuperscript{50} is significant both for its apparent holding that the objective symptoms must be present at the time of employment-cause, and for the proposition that, if the claimant can show the presence of symptoms at that time, it is not necessary that the symptoms actually be

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\textsuperscript{48} 101 Neb. 127, 129-30, 162 N.W. 492, 493 (1917): "It is also said that no 'objective symptoms' of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce 'at the time objective symptoms of an injury,' but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute."

\textsuperscript{49} On the other hand, the legislature employed the term "injury" from L.B. 498 in preference to the phrase "event or result" as stated in L.B. 497 as introduced.

\textsuperscript{50} 174 Neb. 659, 119 N.W.2d 43 (1963).
observed or observable at that time. In other words, the objective-ness requirement can probably be established at a later time, so long as the symptoms are objective, and their presence at the time of employment-cause can be established by evidence.

In most cases, the injured employee or someone else can describe the existence of objective symptoms some of which will normally be observable at the time of the employment-cause. It may be, however, that even at a considerably later date, the objective symptoms present at the time of employment-cause can be "inferable or deducible from the evidence of the physicians who examined and treated him."\(^{51}\)

In *Skalak*, a road maintainer operator had a substantial pre-existing condition of osteomyelitis which had existed for a number of years. He was exposed to cold weather, and the jarring and shaking of the maintainer. After a change in his testimony, he finally testified that he dropped the maintainer blade on his frostbitten foot, that the foot swelled, and that the fall of the blade produced no bruise or laceration but it did produce discoloration by the next day. After noting that this testimony was sufficient to sustain the plaintiff's burden of proof that he suffered an unexpected and unforeseen event happening suddenly and violently, the Court held that it did not establish the existence of objective symptoms of an injury at the time. The opinion states, "The plaintiff described no objective symptom or symptoms. No one else testified to the existence of objective symptoms at the time, and none were inferable or deducible from the evidence of the physicians who examined and treated him."\(^{52}\)

This should mean that an employee who sustains an injury from an employment-cause which does not supply immediate objective symptoms can demonstrate objective symptoms by subsequent medical evidence that the symptoms were present at the time of employment-cause. In some cases, the symptoms may have been observable but not observed. If the symptoms would have been pain or something else easily observable to a workman, it may become necessary factually for the workman to explain away by evidence his own or others' failure to observe the symptoms.\(^{53}\)

\(^{51}\) *Id.* at 668, 119 N.W.2d at 48.

\(^{52}\) *Ibid.*

\(^{53}\) See, *e.g.*, Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 59, 112 N.W.2d 405, 409 (1961): "We observe that it is just a little unusual for an employee to fail to mention an injury at the time of its happening, even to fellow employees. It is even more unusual to take time off
less a part of the res gestae, statements by the workman to others at the time may be excludable hearsay. 54

In some cases, objective symptoms may not even be observable at the time of employment-cause, at least under present medical knowledge. For example, if an employee drinks employer-furnished water at a remote construction site which contains an infectious disease, there may be no objective symptoms for several days. Assuming factual proof of the place of contraction, and medical testimony as to the presence of the germs in the body during an incubation period going back to the time of employment-cause, the employee should be entitled to compensation under the Nebraska statute. 55

The latent injury rules are not exceptions to the objective symptoms requirement. These rules provide that an employee will not be denied compensation for his failure to give notice of his claim within six months or file suit within one year of the accident when it appears that the injury was latent and the employee did not have knowledge of it within the statutory period. 56 But there is nothing in the latent injury rule which dispenses with compliance with all of the accident requirements including that of objective symptoms at the time of employment-cause. In fact, the repeated references to "compensable disability" in the latent injury rule appear to emphasize that except for injury-manifestation, all requirements for the payment of compensation must be met even in latent injury cases.

VII.

THE BURDEN OF FACTUAL PROOF

L.B. 497 codified the burden of proof rules which have been firmly established by judicial decision, but have never before ap-


55 The Minnesota Court reached an opposite result under its previous accident definition. State ex rel. Faribault Woolen Mills Co. v. District Court, 138 Minn. 210, 164 N.W. 810 (1917).

56 See, e.g., Webb v. Consumers Co-op. Ass'n, 171 Neb. 758, 107 N.W.2d 737 (1961). Changing the term "event" to "injury" in the accident definition should have no effect upon references in the notice and statute of limitations sections to "accident" or "injury" since the Court has already applied these provisions to relate to the time at which an employee acquires knowledge of a compensable disability.
appeared in the compensation law. The sentence, "The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment," is a close paraphrasing of an oft-repeated judicial headnote. It seems fair to conclude that this is also a legislative approval of the incidental aspects of these rules, such as the requirement that a compensation award cannot be based on possibilities or speculation, the rules concerning the weight given the trial court's observation of witnesses, and the scope of trial de novo in the Supreme Court.

The sentence, "There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment," should be taken as a legislative codification of the Supreme Court holdings which have refused to engage in such a presumption, either as a matter of law (to which a liberal construction will be given) or as a matter of fact (to which a liberal construction will not be given). The recent

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58 Sometimes the rule has been stated, "An award of compensation in a workmen's compensation case may not be based upon possibilities, probabilities, or speculative evidence." Graber v. Scheer, 173 Neb. 552, 114 N.W.2d 13 (1962). If probability means that it is more likely than not that the injury took place and exists as the claimant contends, then the use of the term "probabilities" seems inappropriate under the overall preponderance of evidence requirement. Cf. Marasco v. Fitzpatrick, 173 Neb. 272, 277, 113 N.W.2d 112, 115 (1962): "The law is well settled that the burden of proof is on the one asserting death due to other than natural causes to establish such fact by a preponderance of the evidence. . . . This does not mean, in a workmen's compensation case, that accidental death must be established to a certainty. The requirement is that it be established to a reasonable certainty. . . . In order that plaintiff recover under the workmen's compensation law for accidental death of an employee, the burden of proof is upon her to show with reasonable certainty that the death was proximately caused by the alleged injury.' Reasonable certainty is not so fixed a criterion that facts and circumstances in other decisions will be particularly helpful in any given case. There is, it is true, a twilight zone where reasonable certainty may be indistinguishable from reasonable probability, but we can say definitely that mere probability or possibility can never bridge that gap."
decisions in *Cochran v. Bellevue Bridge Comm'n*\textsuperscript{59} and *Marasco v. Fitzpatrick*\textsuperscript{60} are illustrative of the type of decision codified by this sentence. The statutory language has much more significance in death cases, especially unwitnessed death cases, than in nonfatal injury situations.

Both of the sentences added to the accident definition employ the phrase "in fact caused by the employment." There was no apparent legislative interpretation to broaden or restrict the general employment relationship "arising out of and in the course of employment." The sentence merely codifies the factual burden of proof requirement, which has always rested upon the compensation claimant, to establish that the injury or death did arise out of and in the course of his employment.

The phrase "in fact caused by the employment" will most nearly approximate the Court's interpretation of "out of employment." Under all of the circumstances, there must be a reasonable causal connection between the conditions under which the work is required to be performed and the injury received.\textsuperscript{61} Stated differently, the occurrence of injury or death at the time and place sustained by the employee must be traceable to some employment circumstances (which, additionally, must have happened suddenly and violently and produced at the time objective symptoms of an injury), or have flowed from some employment circumstances so soon thereafter as not to be attributable to another cause.

These categorical statements are admittedly over generalized and ambiguous. Fortunately, most cases will not push the definitions to their extremes. Where extreme fact applications are presented, the determinations will be difficult. But the courts have decided equally difficult cases in many areas of the law, including the workmen's compensation law. For example, it has not been easy to decide whether a heart attack caused the employee to fall or whether the fall caused a heart attack.\textsuperscript{62} As a matter of social

\textsuperscript{59} 174 Neb. 761, 119 N.W.2d 292 (1963) (bridge tolltaker died from heart attack while delivering money to bank).

\textsuperscript{60} 173 Neb. 272, 113 N.W.2d 112 (1962) (electrician died either by electrocution or from heart attack).


policy, the legislature has concluded that compensation should not be denied to some deserving claimants merely because difficult fact problems will need to be resolved. These sentences mean, as they have previously meant by judicial rule, that compensation will be paid only to the claimant who can sustain a burden of proof by a preponderance of the evidence relating the injury or death to the employment.

VIII. CONCLUSIONS

The only substantive change made in previous Nebraska workmen's compensation law was to eliminate the judicial interpretation that an “unexpected or unforeseen event” meant only an “external” event. The previous rules concerning noncompensability of injuries sustained from ordinary exertion or strain in performing employment duties have been legislatively overruled. Other than deletion of the requirement that a claimant show injury from an external event such as a slip, trip, fall or unusual exertion, the Nebraska workmen’s compensation law has remained unchanged.

A claimant’s burden of factual proof by a preponderance of the evidence, consistently applied in a multitude of judicial decisions from enactment of the compensation statute, now appears in the statute. The absence of a factual presumption of compensability from the occurrence of injury, also judicially applied on numerous occasions, has been codified. The denial of compensation, under rules allowing recovery for aggravation of a pre-existing infirmity, where the resulting condition is a natural progression of the pre-existing infirmity has also been codified.

The most significant effect of these changes will be to focus the primary attention in exertion and strain cases on factual matters of employment and medical causation rather than the fortuitous circumstances under which the injury may have been inflicted. The new cases for which compensation will be allowed under the 1963 amendments are bound to involve extremely difficult fact determinations. But the difficulty of making these factual decisions is no longer a bar to awarding compensation to those claimants who can sustain the burden of factual proof. And the situations which would previously have been compensable under Nebraska law will not be affected by the 1963 amendments.

From the standpoint of legal interpretation, the Court should declare affirmatively that the phrase “happening suddenly and violently” refers to the employment-cause of injury. While the statute has been ambiguous from the outset as to what must happen
"suddenly and violently," the amended language may develop cases which push this uncertainty to its extremes. Relating "suddenly and violently" to employment-cause of injury, the phrase "producing at the time objective symptoms of an injury" will have the intended and effective meaning of requiring objective symptoms at the time of employment-cause. These interpretations will also permit the Court to deal more meaningfully with the time periods which may be considered "suddenly and violently" in the different situations where injuries are brought about during a period extending beyond a single workday.