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COMPENSATION FOR DISEASE UNDER THE MINNESOTA WORKERS’ COMPENSATION LAW

by Kenneth F. Kirwin

Occupational disease has proven to be a difficult concept in Minnesota workers’ compensation law. Compensability depends upon many factors, including risk, causation, and determining what is a disease and how it relates to employment. In this Article, Professor Kirwin traces the evolution of compensation for disease in Minnesota and offers the reader important insights into the statute’s multiple requirements. The length of the occupational disease statute is itself a source of difficulty and confusion. Professor Kirwin reveals to the reader a straightforward, simplified approach to its interpretation.

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Although the author takes sole responsibility for the information and views expressed in this Article, he wishes to acknowledge the invaluable assistance of Bruce Nelson, J.D., William Mitchell College of Law, 1980. While a law student, Mr. Nelson wrote a research paper that was the genesis of the present Article. The author also wishes to acknowledge the assistance of the editors and staff of the William Mitchell Law Review in the preparation of this Article.
I. INTRODUCTION

"My Lords, I have found the construction of [the occupational disease provision] so difficult that after perusing it again and again I am not sure that even now I can accurately state its effect."


Two workers, each pursuing separate employments, contracted tuberculosis from exposure to an infected co-worker. According to the Minnesota Supreme Court, the occupational disease statute supported an award of compensation for one worker and denied an award for the other. Because the statute is lengthy and confusing, an apparently inconsistent result should not be too much of a surprise.

Such a result also demonstrates the importance of a thorough understanding of compensation for disease. This Article undertakes to provide some of that understanding and illuminate some of the areas of confusion. To accomplish this, compensation for disease\(^2\) is analyzed under both the "occupational disease"\(^3\) and "personal injury"\(^4\) provisions of the Minnesota workers' compensation law.\(^5\)

The Article first looks into the historical background\(^6\) and rationale\(^7\) of compensation for work-related disease. A detailed consideration of compensability of work-related disease under the occupational disease provision follows, looking at the judicial construction of the occupational disease definition\(^8\) and undertaking a detailed analysis of that definition.\(^9\) The Article next turns to compensation for work-related disease under the law's "personal injury" definition,\(^10\) a second method for compensating disease that is distinct from the occupational disease provision.\(^11\) Thereafter is considered the statute's presumption in favor of certain diseases contracted by firefighters and peace officers.\(^12\) Finally, some conclusions and recommendations are proffered.\(^13\)

II. HISTORICAL BACKGROUND OF DISEASE COMPENSATION

A. Early Response to Work-Related Disease

Recognition that conditions under which persons labor could effect serious damage upon human bodies long antedated the enlightened findings and fulminations of LeGrand Powers, an early

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2. See notes 362-78 infra and accompanying text.
6. See notes 14-59 infra and accompanying text.
7. See notes 60-85 infra and accompanying text.
8. See notes 101-47 infra and accompanying text.
9. See notes 148-378 infra and accompanying text.
10. See notes 379-431 infra and accompanying text.
12. See notes 432-46 infra and accompanying text.
13. See notes 447-62 infra and accompanying text.
Minnesota reformist and activist Commissioner of Law Statistics, who in 1891 launched an investigation into health risks of factory workers in the state.\textsuperscript{14} As far back as the time of the ancient Greeks, for example, one may find reports revealing remarkable insight into matters such as lung disease resulting from the dust of quarry and pottery work and poisoning derived from the mine and foundry.\textsuperscript{15} Nearer to the present, a medical treatise published in 1700 discoursed upon diseases peculiar to seventy-five occupations.\textsuperscript{16} In nineteenth-century England, literature such as Sir Edwin Chadwick's famous \textit{Report . . . on an Enquiry Into the Sanitary Condition of the Labouring Population of Great Britain} directed attention to the deleterious occupational health effects of the Industrial Revolution.\textsuperscript{17}

The common law, however, offered little recourse for the afflicted.\textsuperscript{18} Thus, the Michigan court reported in 1914, "We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law."\textsuperscript{19} Clearly the difficulty of demonstrating causal proof in an era when medical knowledge was yet rudimentary played a significant role in this record.\textsuperscript{20} Beyond that, the common-law defenses of contributory negligence and assumption of risk unquestionably proved to be formidable obstacles to relief.\textsuperscript{21} Their dynamism is illustrated in a pair of Minnesota decisions from the 1930s. In one, a steel worker

\textsuperscript{14} See 4 W. FOLWELL, A HISTORY OF MINNESOTA 454 (1930).
\textsuperscript{15} See G. FFRENCH, OCCUPATIONAL HEALTH 2 (1974).
\textsuperscript{16} B. RAMAZZINI, DE MORBIS ARTIFICUM DIATRIBA (1700); see Note, Master and Servant—Occupational Diseases, 22 MINN. L. REV. 77, 77 n.2 (1937). Bernardino Ramazzini, who has been called the founder of industrial medicine, see 8 ENCYCLOPAEDIA BRITANNICA MACROPAEDIA Health and Safety Laws 693, 696 (1974), is credited with adding the question, "What is your occupation?" to the preparation of case histories required by medical practice. See 8 ENCYCLOPAEDIA BRITANNICA MICROPAEDIA Ramazzini, Bernardino 404 (1974).
\textsuperscript{17} See 8 ENCYCLOPAEDIA BRITANNICA MACROPAEDIA Health and Safety Laws 693, 696 (1974).
\textsuperscript{18} See 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.20 (1980).
\textsuperscript{20} See Note, supra note 16, at 78.
who contracted a disease by inhaling noxious fumes was denied common-law recovery on grounds of contributory negligence.\(^22\) The court found that he had disregarded company safety regulations.\(^23\) In the other case, a miner who became ill from working in ice-cold water was held to have assumed the risk of harm as a matter of law.\(^24\) There was no remedy in tort, the court said, because the harmful effect of saturation with ice-cold water "must be apparent to even an ignorant and illiterate person."\(^25\) Perhaps the principal reason for the law's laggardness in responding to work-related disease was the lack of public outrage resulting from a basic faith in the virtues of unregulated enterprise\(^26\) and from a prevailing stoic acceptance of illness and death.\(^27\)

Even with the Industrial Revolution, reform was slow in coming. Chancellor Otto von Bismarck of Germany in 1884 instituted a system of compulsory workers' compensation.\(^28\) In 1897, England introduced a no-fault workers' compensation statute to replace common-law remedies\(^29\) but not until 1906 did Parliament finally amend this law to make compensable a list of occupational diseases.\(^30\)

### B. Minnesota's Statutory Response to Work-Related Disease

The appalling discoveries of LeGrand Powers' investigations failed to incite the Minnesota Legislature to act in the nineteenth century.\(^31\) The English experience, however, proved instructive. As the toll of industrial injuries mounted and the woeful inadequacy of applying the law's fault principle became obvious, American legislatures started considering and passing workers' compensation laws.\(^32\) Minnesota did so in 1913.\(^33\)

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\(^{22}\) Cedergren v. Minnesota Steel Co., 188 Minn. 331, 247 N.W. 235 (1933). The disease, tranverse myelitis, was not covered by the occupational disease schedule then in existence. Act of Mar. 15, 1921, ch. 82, § 67(9), 1921 Minn. Laws 90, 128 (repealed 1943).

\(^{23}\) 188 Minn. at 334, 247 N.W. at 236.


\(^{25}\) Id. at 589, 233 N.W. at 465.

\(^{26}\) See A. Larson, supra note 18, § 41.20, at 7-355.


\(^{28}\) See S. Horovitz, Injury and Death Under Workmen's Compensation Laws 5 (1944); A. Larson, supra note 18, § 3.10, at 34 (1978).

\(^{29}\) Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37.

\(^{30}\) Workmen's Compensation Act, 1906, 6 Edw. 7, c. 58, § 8, sched. 3.

\(^{31}\) See W. Folwell, supra note 14, at 454-55.

\(^{32}\) The first state laws to survive constitutional challenge were enacted in 1911. See Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525, 525-26 (1951). See generally A. Larson, supra note 18, § 5.20 (1978).

\(^{33}\) Act of Apr. 24, 1913, ch. 467, 1913 Minn. Laws 675.
Minnesota, albeit shortsightedly, followed the English example34 by incorporating in the initial statute compensation for injuries "by accident" only.35 Thus, the Minnesota statute failed to cope with the gradual development of disease.36 For a disease to be compensable under the statute, not only was causal connection to the risks of employment a necessary element to be proved, but the "accident" test had to be met as well. Moreover, the drafters of the Minnesota law made certain that the narrow scope of the accident test was appreciated by defining "accident" to mean "an unexpected or unforeseen event, happening suddenly and violently . . . and producing at the time, injury to the physical structure of the body."37

While the term "accident" nevertheless was construed liberally to include some diseases,38 the limitations imposed by the Legislature were such that many other diseases were determined to be outside the statute. For example, typhoid fever contracted from

34. Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1.
35. Act of Apr. 24, 1913, ch. 467, § 9, 1913 Minn. Laws 675, 677 (repealed 1953). In so doing, Minnesota was in accord with other American states, see 1B A. LARSON, supra note 18, § 37.10, although Massachusetts did not include a "by accident" requirement in its 1911 act, cf. Hurle's Case, 217 Mass. 223, 104 N.E. 336 (1914) (optic neuritis from long exposure to coal gas is a compensable "personal injury" within the worker's compensation statute), and California deleted its accident requirement in 1915. See 1B A. LARSON, supra, § 41.20, at 7-355 & n.16.
36. In this, the Minnesota law conformed to the acts of other states, although California and Wisconsin quite early specified coverage for "disease." 1B A. LARSON, supra note 18, § 41.20, at 7-355; cf. Wenrich v. Industrial Comm'n, 182 Wis. 379, 196 N.W. 824 (1924) (fact that employee's infirm condition predated occupational disease amendment did not preclude recovery when disease manifested itself after amendment).
37. Act of Apr. 24, 1913, ch. 467, § 34(h), 1913 Minn. Laws 675, 693 (repealed 1953). This definition of "accident," with the words "and occupational disease as defined in paragraph (n)" added in 1943, Act of Apr. 24, 1943, ch. 633, § 2, 1943 Minn. Laws 969, 970, remained in the law until it was repealed in 1953. Act of Apr. 24, 1953, ch. 755, § 83, 1953 Minn. Laws 1099, 1156.
38. See, e.g., Ueltschi v. Certified Ice & Fuel Co., 201 Minn. 302, 276 N.W. 220 (1937) (heatstroke from working on three very hot days); Adler v. Interstate Power Co., 180 Minn. 192, 230 N.W. 466 (1930) (gas poisoning from inhalation of coal fumes); State ex rel. Rau v. District Court, 138 Minn. 250, 164 N.W. 916 (1917) (sunstroke during afternoon's work). See generally W. SCHNEIDER, WORKMEN'S COMPENSATION § 927 (1943), in which it is observed:

There has been no uniformity in [the] decisions. They have varied from the judicial observation that "an accident does not happen all day" to an award of compensation for an "accident" which required several years for it to culminate in bronchial asthma, it being held accidental in the sense that it was unintended and unexpected.

Id. at 508 (footnote omitted).
germs in drinking water at work was held noncompensable for failing to meet the accident definition. In another case, a hardworking stonecutter whose muscles atrophied following tremendous strain from operating a defective machine was denied the benefits of compensation because the circumstances did not include a "violent rupture or collapse of some physical structure or function of the body." Finally, the court held that an employee's pneumoconiosis from dust at work was not an accidental injury because "[a]ccidents do not and cannot take years in the happening."

The apparent injustice of decisions like these was rectified partially in 1921 by an amendment explicitly compensating victims of occupational disease. Despite the effort, however, two problems remained. First, rather than draft a general all-encompassing in-

39. State ex rel. Faribault Woolen Mills Co. v. District Court, 138 Minn. 210, 164 N.W. 810 (1917). The court pointed out that since no deleterious effects resulted until the germs multiplied enormously and no symptoms were discernible until a week after infection, the inception of the disease was neither sudden nor violent. Id. at 211, 164 N.W. at 811. The court also noted that the disease did not result from an event that produced "injury to the physical structure of the body" at the time it happened, as required by the statute's definition of "accident." Id.


41. Golden v. Lerch Bros., 211 Minn. 30, 37, 300 N.W. 207, 211 (1941).

42. Act of Mar. 15, 1921, ch. 82, § 67, 1921 Minn. Laws 90, 126 (repealed 1943). Subsection 1 specified that an employee's "disablement . . . resulting from an occupational disease . . . shall be treated as the happening of an accident" under the statute, and subsection 2 provided compensation for disability or death caused by an occupational disease. See id. § 67(1)-(2), 1921 Minn. Laws at 126.

In addition to the provisions discussed in note 45 infra and accompanying text, the 1921 Act included the following: an employee disabled by occupational disease but able to work for less wages at another occupation received "a percentage of full compensation proportionate to the reduction in his earning capacity," id. § 67(2), 1921 Minn. Laws at 126; an employee who at the time of employment falsely represented in writing that he had not previously suffered from the disease was denied compensation, id. § 67(4), 1921 Minn. Laws at 126; employers could receive contribution from previous employers based upon a time in service apportionment, id. § 67(5), 1921 Minn. Laws at 126; an employee need notify or make a claim only upon the last employer, id. § 67(6), 1921 Minn. Laws at 126; and, nothing in the section affected the rights of an employee to recover compensation for a disease not covered by the section if the disease was an accidental personal injury under the Act. Id. § 67(10), 1921 Minn. Laws at 126.

These provisions, with the subsequent changes described in note 47 infra, remained in the compensation act until 1973, when all of them were repealed except for subsection 1 which was changed to refer to disablement from occupational disease as a personal injury rather than as the happening of an accident. Act of May 24, 1973, ch. 643, §§ 11-12, 1973 Minn. Laws 1584, 1593-94 (codified at Minn. Stat. § 176.66(1) (1978)).
clusion clause, as California did in 1917, 43 the legislators opted for a more limited approach. They adopted the English practice of extending coverage only to a scheduled list of diseases. 44 Second, obviously concerned over problems of proof and potential abuse, the Legislature coupled the schedule with an arbitrary time limit requiring the contraction of disease within twelve months before the subsequent disablement. 45 If more than twelve months had

43. See 1 B. A. Larson, supra note 18, § 41.20 at 7-355 n.17.
44. Act of Mar. 15, 1921, ch. 82, § 67(9), 1921 Minn. Laws 90, 128. The schedule of diseases was first used in England in 1906. See Workmen’s Compensation Act, 1906, 6 Edw. 7, c. 58, § 8, sched. 3. This method was first adopted in the United States by New York in 1920. See 1 B. A. Larson, supra note 18, § 41.20, at 7-355. Like the New York provision, Minnesota’s schedule included two columns. The first column listed 23 types of disease (a 24th category was added in 1939, see Act of Apr. 20, 1939, ch. 306, 1939 Minn. Laws 429). The second column described an occupational process. To be compensable, the disability or death had to be caused by an enumerated disease contracted in the specified corresponding process. The disease had to be “due to the nature of” the corresponding process in which the employee was engaged and contracted the disease, Act of Mar. 15, 1921, ch. 82, § 67(2), 1921 Minn. Laws 90, 126, but if the employee “at or immediately before the date of disablement, was employed in [the] process” the disease was “presumptively . . . deemed to have been due” to its nature. Id. § 67(8), 1921 Minn. Laws at 126. For example, an employee could be compensated for disability from “Glanders” if contracted from “[c]are or handling of any equine animal or the carcass of any such animal” or disability from “[i]nflammation of the synovial lining of the wrist joint and tendon sheaths” if contracted from “[m]ining.” Id. § 67(9), 1921 Minn. Laws at 126.

Ogren v. City of Duluth, 219 Minn. 555, 18 N.W.2d 535 (1945), Kvernstoen v. Nelson, 212 Minn. 102, 2 N.W.2d 560 (1942), Kellerman v. City of St. Paul, 211 Minn. 351, 1 N.W.2d 378 (1941), and Funk v. Minnesota Mining & Mfg. Co., 192 Minn. 440, 256 N.W. 889 (1934), appear to be the only Minnesota Supreme Court cases construing the schedule. See Note, supra note 16, at 97 n.109.

By specifying diseases, naturally, some occupational diseases were still outside the statute. In Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 244, 201 N.W. 305, 307 (1924), the court held that those afflicted by unlisted occupational diseases continued to have their “long-existing common law right.”

45. Act of Mar. 15, 1921, ch. 82, § 67(3), 1921 Minn. Laws 90, 127. This requirement was modified slightly in 1943 to permit silicosis and asbestosis to have been contracted within three years before disablement, see Act of Apr. 24, 1943, ch. 633, § 4(3), 1943 Minn. Laws 969, 971, in 1949 to have the time run from “last exposure” rather than contraction in silicosis and asbestosis cases, see Act of Apr. 20, 1949, ch. 500, § 1, 1949 Minn. Laws 838, 838, and in 1955 to add a presumption of firefighters’ timely contraction of myocarditis, coronary sclerosis, pneumonia, or its sequel. See Act of Mar. 21, 1955, ch. 206, § 2, 1955 Minn. Laws 302, 303. The latter presumption was subsequently extended to police officers and members of the highway patrol, conservation officer service, and state crime bureau. See Act of May 25, 1967, ch. 905, §§ 3(3), 9, 1967 Minn. Laws 1962, 1964, 1967 (“game wardens” changed to “conservation officers”); Act of May 6, 1963, ch. 497, § 2, 1963 Minn. Laws 731, 732 (game warden service and crime bureau); Act of Feb. 19, 1959, ch. 20, § 2, 1959 Minn. Laws 44, 45 (highway patrol); Act of Apr. 29, 1957, ch. 834, § 2, 1957 Minn. Laws 1183, 1184 (police). See also notes 52-59 infra and accompanying text.

The law defined “disablement” as the act of becoming “disabled from earning full wages at the work at which the employee was last employed.” Act of Mar. 15, 1921, ch.
elapsed, the disease was not compensated.

In 1943 the Minnesota Legislature altered the occupational disease provisions by eliminating the schedule and fashioning a definition of occupational disease. Minnesota, which can be proud


The law did not, however, define “contracted,” and much litigation occurred over the application of that term. See, e.g., Anderson v. City of Minneapolis, 258 Minn. 221, 103 N.W.2d 397 (1960) (coronary sclerosis); Kalmes v. Kahler Corp., 258 Minn. 105, 103 N.W.2d 203 (1960) (tuberculosis); Corcoran v. P.G. Corcoran Co., 245 Minn. 258, 71 N.W.2d 787 (1955) (pulmonary berylliosis); Yaeager v. Delano Granite Works, 236 Minn. 128, 52 N.W.2d 116 (1952) (silicosis); Kellerman v. City of St. Paul, 211 Minn. 351, 1 N.W.2d 378 (1941) (coronary sclerosis). The rule evolved that the disease was “contracted” from when it “first manifested itself so as to interfere with bodily functions.” See 258 Minn. at 110, 103 N.W.2d at 207; 245 Minn. at 265, 71 N.W.2d at 792; 236 Minn. at 133, 52 N.W.2d at 119; 211 Minn. at 354, 1 N.W.2d at 380. This still left problems in determining the necessary degree of interference. See 258 Minn. at 225-26, 103 N.W.2d at 400-01. The Anderson court undertook to ameliorate these problems by specifying that the disease “interfere with bodily functions to such an extent that the employee can no longer substantially perform the duties of his employment.” Id. at 226, 103 N.W.2d at 401.

In 1973 the Legislature prudently got rid of the requirement that one must contract the disease within a particular time before disablement, and specified that in case of injury by occupational disease the employee need only “give notice to the employer and commence his action within two years after the employee has knowledge of the cause of such injury and the injury has resulted in disability.” Act of May 24, 1973, ch. 643, §§ 10, 12, 1973 Minn. Laws 1584, 1593, 1594. The time limit was later increased to three years. Act of June 4, 1975, ch. 359, § 17, 1975 Minn. Laws 1168, 1186 (codified at Minn. Stat. § 176.151(4) (1978)).


47. Id. § 3, 1943 Minn. Laws at 970. Section 3 also included a provision specifying that “prior legislative enumerations of occupational disease shall not entitle any employee afflicted with such disease to a presumption that the same is in fact an occupational disease.” Id. This latter provision remained in the law until it was repealed in 1953. Act of Apr. 24, 1953, ch. 755, § 83, 1953 Minn. Laws 1099, 1156.

Act of Apr. 24, 1943, ch. 633, 1943 Minn. Laws 969 made no changes of substance in the 1921 provisions referred to in notes 42 and 45 supra except to change the reduction in earning capacity compensation to two-thirds of the difference between the wage before and after disablement for not longer than 25 weeks, id. § 4(2), 1943 Minn. Laws at 970; allow silicosis or asbestosis to have been contracted within three years before disablement, id. § 4(3), 1943 Minn. Laws at 970; and allow apportionment among employers in certain circumstances to be based upon exposure as well as time in service, id. § 4(5), 1943 Minn. Laws at 970.

The 1943 Act also inaugurated a number of new provisions. These included provisions requiring apportionment when disease or death resulted from the combined effects of occupational disease and non-compensable disease or infirmity, id. § 7, 1943 Minn. Laws at 973; excluding occupational disease compensation for employee refusal to use safety appliances, obey safety rules, or perform a statutory duty, id.; presuming, absent “conclusive evidence,” that silicosis or asbestosis was not due to employment unless, during the ten years preceding disablement, the employee was exposed to silica or asbestos dust for not less than five years, the last three of which had to be within Minnesota, id. § 8, 1943 Minn. Laws at 973; dispensing with apportionment in certain cases of silicosis or asbestosis com-
of having been an early proponent of workers' compensation in complicated with tuberculosis, id.; authorizing an order to remove an employee with occupational disease from medically inadvisable and unduly hazardous employment, with retraining and up to 25 weeks of compensation as if the employee were disabled, id.; authorizing approval of an employee's waiver, as an alternative to forced change of occupation, of full compensation for aggravation of occupational disease, id. § 9, 1943 Minn. Laws at 975; specifying times for notice and claim, id. § 10, 1943 Minn. Laws at 975; excluding partial disability compensation from silicosis or asbestosis unless partial disability followed a compensable period of total disability, id.; putting a dollar limit on compensation for total disability or death from silicosis or asbestosis, id.; limiting each party to taking testimony of only one physician in a compensation hearing on occupational disease, id. § 11, 1943 Minn. Laws at 976; authorizing investigation to determine whether an employee should be permitted to continue in hazardous employment, id. § 12, 1943 Minn. Laws at 977; providing for pre-employment, annual, and post-employment medical examination of employees exposed to the hazard of silicosis or asbestosis, id. § 13, 1943 Minn. Laws at 978; requiring inspection of and regulations to be established for places of employment posing occupational disease hazards, id. § 14, 1943 Minn. Laws at 979.

The 1943 Act also included new provisions for medical boards to resolve medical issues in occupational disease cases. Id. § 11, 1943 Minn. Laws at 976; see NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 51 (1972) (Recommendations 2.15, 2.16); Solomons, Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems, 41 ALB. L. REV. 195, 226 (1977), reprinted in 4 WORKMEN'S COMP. L. REV. 11, 42 (1979). Under the Minnesota statute, a three-doctor medical board was assembled from a panel of 15 doctors by each party selecting a doctor and the two doctors selecting a third. Act of Apr. 24, 1943, ch. 633, § 11, 1943 Minn. Laws at 976. The medical board could examine the employee, hear witnesses, and make such other examinations as it deemed necessary. Id. at 977.

The medical board's most significant responsibility was to determine whether the employee was affected with an occupational disease within the meaning of the statute and the approximate dates of contraction and disablement, and the compensation court was to adopt these determinations as its decision. Id. The medical board was given a number of other functions under the 1943 Act's other new provisions described previously in this footnote. See id. § 7, 1943 Minn. Laws at 973 (determining occupational disease's percentage of contribution to disease or death); id. § 9, 1943 Minn. Laws at 975 (recommending approval of employee's waiver of full compensation for aggravation); id. § 12, 1943 Minn. Laws at 977-78 (recommending and participating in investigation of whether employee should be permitted to continue in hazardous employment).

The Minnesota Supreme Court held all these grants of responsibility to medical boards unconstitutional in Hunter v. Zenith Dredge Co., 220 Minn. 318, 19 N.W.2d 797 (1945). It found due process violated by the Act's failure to require the medical board to file a transcript of the evidence upon which its findings were based, in that this frustrated the right of review of whether the findings had sufficient evidentiary foundation. Id. at 325-28, 19 N.W.2d at 799-800. The court did not strike down the whole 1943 Act, but merely those parts relating to the creation and functions of medical boards. Id. at 328-29, 19 N.W.2d at 800-01.

Apart from the presumptions regarding diseases of certain government employees discussed in the first paragraph of note 45 supra and in notes 52-59 infra and accompanying text, the Legislature made a number of changes of some substance in the occupational disease provisions during the 30 years after 1943. See Act of Apr. 28, 1947, ch. 612, § 1, 1947 Minn. Laws 1105, 1105 (replacing 25-week limit on compensation for reduction in earning capacity with reference to statute's temporary partial disability provision); id. § 2, 1947 Minn. Laws at 1106 (requiring last five, rather than three, years of exposure to be in
America, has no reason to be pretentious about the draftsmanship of this provision, which remains fundamentally intact to this day.\textsuperscript{48} Although the clear legislative intention “was to broaden the scope and enlarge the field within which . . . occupational risks were to be covered,”\textsuperscript{49} the definition can justly claim to be among the less lucid, and indeed more exasperatingly prolix, portions of the entire compensation law. This definition apparently was crafted with a view toward tight limitation and control of disease compensation with causal requirements exceeding those for personal injury compensation. The blurry distinction between injury and disease was further obscured in 1953 when the Legislature eliminated the “accident” requirement for personal injury recovery.\textsuperscript{50}

\begin{itemize}
\item Minnesota to avoid presumption that silicosis or asbestosis not due to employment (restored to three years by Act of Apr. 20, 1949, ch. 500, § 5, 1949 Minn. Laws 838, 840); Act of Apr. 28, 1947, ch. 612, § 3, 1947 Minn. Laws 1105, 1107 (increasing dollar limit on compensation for total disability or death from silicosis or asbestosis); \textit{id.} § 4, 1947 Minn. Laws at 1108 (removing restriction of each party to one physician’s testimony); \textit{id.} § 5, 1947 Minn. Laws at 1108 (requiring employer to pay all rather than half of annual silicosis or asbestosis examination cost); Act of Apr. 20, 1949, ch. 500, § 1, 1949 Minn. Laws 838, 838 (changing time before considered disabled to run from last exposure rather than contraction in silicosis and asbestosis cases); Act of Apr. 18, 1951, ch. 454, 1951 Minn. Laws 679, 679-80 (specifying that “[i]n all cases except silicosis or asbestosis unless the employer shall have actual notice” as condition to duty to give notice within time specified, replacing one year for claim requirement with reference to general time-for-claim provision, and removing dollar limit for compensation for disability or death from silicosis or asbestosis); Act of Feb. 21, 1957, ch. 34, 1957 Minn. Laws 49 (adding presumption that tuberculosis contracted by nurse in certain situations is occupational disease, defining “contracts tuberculosis,” and making exceptions from time limitations); Act of May 20, 1971, ch. 422, § 11, 1971 Minn. Laws 719, 726 (increasing maximum on benefits to employee ordered removed from employment from 25 to 104 weeks).

In 1973 all these special provisions on occupational disease were repealed, Act of May 24, 1973, ch. 643, § 12, 1973 Minn. Laws 1584, 1594, the provision specifying that disablement resulting from an occupational disease be treated “as the happening of an accident” was changed to make it be regarded “as a personal injury,” and the “disablement” definition was omitted, \textit{id.} § 11, 1973 Minn. Laws at 1593 (codified at \textsc{Minn. Stat.} § 176.66(1) (1978)).

48. \textit{See Minn. Stat.} § 176.011(15) (1978 & Supp. 1979). Except for the 1955 addition to the first sentence of the words “and shall include undulant fever,” \textit{see} Act of Apr. 21, 1955, ch. 652, 1955 Minn. Laws 985, and for the additions and extensions of the presumption discussed in notes 52-59 infra and accompanying text, no substantive changes have been made in this provision since 1943.


50. Act of Apr. 24, 1953, ch. 755, § 1(16), 1953 Minn. Laws 1099, 1101. The desirability of eliminating the “accident” requirement had just recently been indicated in Riesenfeld, \textit{supra} note 32, at 539.

Minnesota was one of the earlier states to dispense with the “accident” requirement and is currently joined by seven other states in this respect. \textit{See} 1B A. Larson, \textit{supra} note
Despite the occupational disease definition’s sorry lack of precision, the Legislature has, except for cosmetic changes, seen fit to revise the definition only by adding a special presumption for a few diseases—“myocarditis, coronary sclerosis, pneumonia or its sequel”—contracted within an explicit list of occupations. Initially limited to firefighters, the list has since been expanded to include police and members of the highway patrol, conservation officer service, and state crime bureau. Later amendments added sheriffs and full-time deputy sheriffs, and forest officers of the Department of Natural Resources.

III. RATIONALE FOR DISEASE COMPENSATION

The opinions frequently say that occupational disease provisions should be construed liberally to effect their legislative objectives.
Interpretation of these provisions, therefore, requires an understanding of those objectives.

In one sense, the primary aim of disease compensation reflects the broad inclusionary principles\(^6\) of workers' compensation as a whole.\(^6\) As a remedial measure designed to overcome the economic insecurity and distress thrust upon workers saddled with occupational disability and left without adequate legal redress within a fault-based tort system,\(^6\) workers' compensation favors relief for disabled victims by including them in a substitutional no-fault scheme.\(^6\) Underlying this no-fault scheme is a social policy determination that the individual economic burdens are handled most equitably as a cost of doing business to be spread among the consuming public.\(^6\) Furthermore, the scheme promises secondary benefits of encouraging safer conditions at the workplace, relieving charities and government from financial drain for care of the victims, and reducing litigation.\(^6\)

A corollary to these concepts is an inclusionary interest that demands similar treatment for disease and accidental injury.\(^6\) Based upon resistance to arbitrary distinctions, this interest favors inclusion of disease within a compensation scheme that already covers other injury. A hypothetical query by the Idaho court illustrates this interest well. The court questioned why one worker, killed while driving an employer's auto because several years of grinding by rocks had worn the tires down until they blew out, should be

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\(^6\) See Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 221, 21 N.W.2d 612, 616 (1946), quoted in Gray v. City of St. Paul, 250 Minn. 220, 228, 84 N.W.2d 606, 611 (1957), in which the court said, "The obvious purpose of the 1943 act was to broaden the scope and enlarge the field within which such occupational risks were to be covered."

\(^6\) See 3 W. Schneider, supra note 38, § 925, at 499 (underlying theory for compensating work accidents applies as well to diseases arising out of and caused by conditions of employment); Beers, Compensation for Occupational Diseases, 37 Yale L.J. 579, 579 (1928) (basis for compensation for occupational disease and for accident is same).

\(^6\) See notes 14-27 supra and accompanying text.

\(^6\) See 1 A. Larson, supra note 18, § 2.20 (1978); Riesenfeld, supra note 32, at 529-32.

\(^6\) See 1 A. Larson, supra note 18, § 2.20 (1978); 2 W. Schneider, supra note 38, § 925, at 499; Beers, supra note 62, at 579; Riesenfeld, supra note 32, at 529.

\(^6\) See Chamber of Commerce of the U.S., Analysis of Worker's Compensation Laws 3 (1979); S. Horovitz, supra note 28, at 2, 6, 8.

\(^6\) See 3 W. Schneider, supra note 38, § 925, at 499 (same underlying theory applies to both "whether or not [the] diseases are strictly what are known as occupational diseases"); Beers, supra note 62, at 581 ("no sound difference in principle between an incapacity or death which has its roots in occupation and one resulting from accident"); cf. National Commission on State Workmen's Compensation Laws, Report 50 (1972) (Recommendation 2.14) ("arising out of and in the course of employment" test should be used to determine coverage of both injuries and diseases).
treated better than another worker killed by tuberculosis because silica dust had ground on his lungs until they gave out.\footnote{68}

On the other hand, an exclusionary interest favoring greater restriction on compensation for disease than for non-disease injury is evident in most states' statutes. Although only ten states have definitions\footnote{69} of occupational disease longer than Minnesota's,\footnote{70} all but four states\footnote{71} have provisions that, at least on their face, impose

\footnote{68. Beaver v. Morrison-Knudson Co., 55 Idaho 275, 295, 41 P.2d 605, 613 (1934). The court used this rationale to support a liberal reading of an "accident" requirement. For Minnesota's approach under its former accident requirement, see notes 37-41 supra and accompanying text.}


\footnote{71. These states are California, Illinois, New Jersey, and Wisconsin. See CAL. LAB. CODE § 3208 (West Supp. 1980) ("injury" includes "any injury or disease arising out of the employment"); WIS. STAT. ANN. § 102.01(1)(e) (West 1973) ("injury" includes "mental or physical harm to an employee caused by accident or disease"); id. § 102.03(1)(e) (employer liable when "accident or disease causing injury arises out of his employment"). ILL. ANN. STAT. ch. 48, § 172.36(d) (Smith-Hurd Cum. Supp. 1980-1981), provides in relevant part: In this Act the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public. A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence. An employee shall be conclusively deemed to have been exposed to the...
more requirements for compensating occupational disease than for personal injury generally. Seven states' requirements are so minimal that they probably result in no practical differences. But the remaining states' provisions at least seem to be aimed at making a difference. Several states require the disease to be "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment.” Three states require the disease to be "peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment.” Another requires it to be "peculiar to a particular industrial process, trade, or occupation and to which an employee is not ordinarily subjected or exposed outside of or

hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists . . . .

Id. N.J. STAT. ANN. § 34:15-31 (West 1959) provides:

For the purposes of this article, the phrase "compensable occupational disease” shall include all diseases arising out of and in the course of employment, which are due to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or employment, or which diseases are due to the exposure of any employee to a cause thereof arising out of and in the course of his employment.

Id. (emphasis added).

72. See ALASKA STAT. § 23.30.265(13) (1972) (disease must arise “naturally” out of the employment); DEL. CODE ANN. tit. 19, § 2301(4) (1979) (exposure must have “occurred during employment”); HAWAII REV. STAT. § 386-3 (1968) (disease must be “proximately caused by or resulting from the nature of the employment”) (emphasis added); MD. WORK. COMP. CODE ANN. art. 101, § 22(a) (1979) (disease must be “due to the nature of the occupation or process in which he was employed”); id. § 67(13) (disease must be “contracted as the result of” employment); MASS. GEN. LAWS ANN. ch. 149, § 1 (West 1971) (disease must be “caused by the nature or circumstances of the employment”); N.Y. WORK. COMP. LAW § 39 (McKinney Cum. Supp. 1979-1980) (disease must be “due to the nature of the . . . employment”); OR. REV. STAT. § 656.802 (1977) (disease must be one “to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment”); WYO. STAT. § 27-12-102(a)(xi)(a) (1977) (does not include “communicable disease unless the risk of contracting the disease is increased by the nature of the employment”); cf. D.C. CODE ENCYCL. § 36-501, ¶ 13 (West 1968) (same as Alaska).


away from his employment."\textsuperscript{75} One state requires "proximate" causation,\textsuperscript{76} two require "direct" causation,\textsuperscript{77} and three others require both.\textsuperscript{78} Still another excludes an "[o]rdinary disease of life to which the general public is exposed outside of the employment."\textsuperscript{79} The other twenty-two states, although usually at less length than...
Minnesota, set forth combinations of these or other requirements.\textsuperscript{80}

In his treatise, Professor Larson discusses several possible reasons for this trend toward statutory exclusion of some disease.\textsuperscript{81} One possibility derives from the premise that, because compensation is a substitute for fault liability, it ought not compensate that which in the past was thought to be outside the realm of potential fault relief.\textsuperscript{82} A second concern was that occupational disease was so generalized and extensive a problem that a workers' compensation system could not deal with it effectively.\textsuperscript{83} A third rests upon a cost-benefit analysis that questions the social gain derived from liberal compensation. Because certain occupations have a heavy incidence of disease, relief might place an intolerable burden on the compensation system.\textsuperscript{84}

Each of these points is subject to rebuttal. First, the idea that occupational disease was not compensable at common law proved to be erroneous,\textsuperscript{85} and an erroneous idea is a poor basis for legal consequences. Second, the workers' compensation system has proven equal to the task of administering compensation for work-related disease. Finally, it is intolerable to put the burden of employment-caused disease on workers rather than to assess it upon industry to be added to the cost of the industry's product and passed on to consumers.

\section*{IV. Compensation Under the Occupational Disease Definition}

\subsection*{A. Generally}

The Minnesota workers' compensation law does not provide compensation for occupational disease directly. Rather, in addi-


\textsuperscript{81} See 1B A. LARSON, supra note 18, § 41.20.

\textsuperscript{82} See id. at 7-354; notes 18-27 supra and accompanying text.

\textsuperscript{83} See 1B A. LARSON, supra note 18, § 41.20, at 7-354 to -355.

\textsuperscript{84} See id. at 7-355.

\textsuperscript{85} See note 19 supra.
tion to death benefits, it provides compensation for medical treatment required by "personal injury." "Personal injury," in turn, includes:

1. "injury arising out of and in the course of employment,"
2. "personal injury caused by occupational disease," and
3. "the disablement of an employee resulting from an occupational disease."

Putting aside number (1) for the moment, an employee proceeding under (2) or (3) would have to show:

1. that the employee had an "occupational disease," and
2. that the occupational disease caused personal injury or disablement.

86. See Minn. Stat. § 176.021(1) (1978) (employer liable for compensation in case of death arising out of and in the course of employment); id. § 176.111 (Supp. 1979) (death benefits).

On the face of the statute, compensation for death is not conditioned upon meeting the "personal injury" or "occupational disease" definition. In Morgan v. State, 281 N.W.2d 710 (Minn. 1979), the court, in affirming a denial of compensation to a widow who claimed her husband's death was partially caused by work-incurred asbestosis, did not focus upon the personal injury or occupational disease definitions, but affirmed the finding that "the death . . . did not arise out of and in the course of his employment," id. at 711, on the ground that "relator did not sustain her burden of proving causal relation between employee's work activities and his death." Id. at 712.

From 1921 until 1973, the compensation law, in addition to providing that an employee's disablement resulting from an occupational disease be treated as the happening of an accident, specified entitlement to compensation for disability or death caused by an occupational disease. See Act of Mar. 15, 1921, ch. 82, § 67(1)-(2), 1921 Minn. Laws 126, 126-27, as amended by Act of May 24, 1973, ch. 643, §§ 11-12, 1973 Minn. Laws 1592, 1594 (amending subdivision 1 to specify personal injury rather than the happening of an accident and repealing subdivision 2) (partially codified at Minn. Stat. § 176.66(1) (1978)).

87. See Minn. Stat. § 176.135(1) (Supp. 1979) (employer to furnish treatment "reasonably required . . . to cure and relieve from the effects of the injury"). See also id. § 176.102 (Supp. 1979) (rehabilitation); id. § 176.137 (1978) (remodeling residence for handicapped employee).


89. See id. § 176.021(1) (1978) (employer liable for compensation in case of personal injury).

90. Id. § 176.011(16) (1978). This provision goes on to specify, inter alia, that personal injury "does not cover an employee except while engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service." Id.

91. Id.

92. Id. § 176.66 (1978).

93. Assuming that "disablement" is the same as "disability," it would have to be shown in any event for disability compensation, see note 88 supra and accompanying text,
The Minnesota statute gives "occupational disease" a long, confusing, and seemingly contradictory definition:

"Occupational disease" means a disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever. Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by


From 1921 until 1973, the compensation law contained a definition of "disablement," defining it as the act of becoming "disabled from earning full wages at the work at which the employee was last employed." Act of Mar. 15, 1921, ch. 82, § 67(1), 1921 Minn. Laws 1594, 1594 (repealed 1973).

Regarding the causal connection between the occupational disease and the compensable result—personal injury, disability, or death—see notes 222-50 infra and accompanying text. See also Ulve v. Bemidji Coop. Creamery Ass'n, 267 Minn. 412, 127 N.W.2d 147 (1964), upholding a determination that after an employee's allergic dermatitis occupational disease was cured, his continuing disability because of allergy to many substances was not caused by the occupational disease but by inherent sensitivity.

94. Only ten states have definitions of occupational disease longer than Minnesota's. See note 70 infra and accompanying text.

95. The inclusion of undulant fever (added by Act of Apr. 21, 1955, ch. 652, § 1, 1955 Minn. Laws 985, 985) is particularly curious. Undulant fever, also known as brucellosis, is an infectious disease characterized by fever, sweating, weakness, and aching that may persist for months or years. It is transmitted to man from lower animals. Blakiston's Gould Medical Dictionary 225 (3d ed. 1972); Stedman's Medical Dictionary 199 (4th unabridged lawyers' ed. 1976). Notwithstanding the flat statement, "'Occupational disease' . . . shall include undulant fever," it seems a claimant would have to show the undulant fever otherwise qualified under the statute.

96. At first blush, the requirement that the disease be peculiar to the occupation and the requirement that the disease be recognized as a hazard characteristic of and peculiar to the occupation seem inconsistent with the provision that ordinary diseases of life are compensable if the exposure is peculiar to the occupation.

In Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 21 N.W.2d 612 (1946), the court concluded its opinion, devoted to construction of the occupational disease definition, with the following quotation from Professor Williston: "When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the principal or more important clause." Id. at 223, 21 N.W.2d at 617. This language still appears in the latest edition of Professor Williston's treatise. 4 S. Williston, A Treatise on the Law of Contracts § 624, at 822 (3d ed. W. Jaeger 1961).
the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment. 97

Looking at the definition, one would gain the impression that when the 1943 Legislature 98 decided to replace the previous schedule approach 99 with the current definition approach, it looked at the statutes of other states using definitions and liked them all!100 The definition seems to include everything but the kitchen sink.

B. Judicial Construction of the Occupational Disease Definition

Few cases have made meaningful attempts to clarify the definition’s words and phrases. Some opinions merely have quoted the definition without elaboration. 101 Others have quoted or emphasized specific clauses within the definition, also without elaboration. Some attempt has been made, however, to illuminate the meaning of the occupational disease definition.

97. MINN. STAT. § 176.011(15) (1978 & Supp. 1979) (hereinafter called “the definition”). Subdivision 15 goes on to provide a presumption of occupational disease for specified diseases of certain public employees. See notes 52-59 supra and accompanying text and notes 432-46 infra and accompanying text.


99. See note 44 supra and accompanying text.


102. See, e.g., Schwartz v. City of Duluth, 264 Minn. 514, 517-18, 119 N.W.2d 822, 824 (1963) (upholding coverage of fireman’s coronary thrombosis from stress) (quoting substantially all of first three sentences).

103. See, e.g., Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 187-88 (Minn. 1978) (upholding compensation for car starter’s pulmonary emphysema from exhaust fumes) (italicizing first part of third and fourth sentences regarding direct and proximate causation); Atkins v. Page Bros., 24 Minn. Workmen’s Comp. Dec. 503, 508 n.1 (1968) (personal injury but not occupational disease coverage for business manager’s coronary sclerosis from stress) (underlining second sentence regarding ordinary diseases of life and fourth sentence’s words “characteristic of and peculiar to the trade, occupation, process, or employment”). For further discussion of Atkins, see notes 173-75 infra and accompanying text.
Hunter v. Zenith Dredge Co.,\textsuperscript{104} decided in 1945, was the first case arising under the 1943 definition to come before the Minnesota Supreme Court.\textsuperscript{105} Finding occupational disease coverage as a matter of law for a shipyard worker's bursitis or synovitis from working with his knee on cold steel plates while operating an air gun, the court said:

[T]he legislature provided that, to establish an occupational disease, the evidence must disclose (1) that it arose out of and in the course of employment; (2) that it was peculiar to the occupation in which the employee was engaged; and (3) that it was due to causes in excess of the ordinary hazards of employment. Under the statutory definition, ordinary diseases of life to which all members of the general public are equally exposed outside of employment are not compensable except where they follow as an incident to an occupational disease, or where the exposure peculiar to the occupation makes such disease an occupational disease hazard.

Here, it would seem that . . . relator’s disability readily falls within the above statutory requirements. Both medical experts testified that there was a direct causal connection between the disease and the employment. Certainly the court may take judicial notice that bursitis or synovitis is not one of the ordinary diseases of life to which all members of the general public are equally exposed. It is equally clear that the disease is due to causes in excess of the ordinary hazards of employment. The medical experts further testified that the disease was peculiar to any occupation wherein either the knees or the elbows of a worker were required to come in constant contact with cold, hard surfaces, and that bursitis of various kinds was becoming more and more common to shipyard workers; and, in particular, that relator’s disability was brought about by the manner in which he was required to work, which was peculiar to his occupation.\textsuperscript{106}

A year later, in Sandy v. Walter Butler Shipbuilders, Inc.,\textsuperscript{107} the court again found occupational disease coverage as a matter of law, this time for a machinist's dermatitis from spun glass insulation dust permeating ship hulls in which he worked. The employee sued the employer at common law for negligence, claiming the occupational disease definition did not apply because there

\textsuperscript{104} 220 Minn. 318, 19 N.W.2d 795 (1945).
\textsuperscript{105} See id. at 330, 19 N.W.2d at 801.
\textsuperscript{106} Id. at 330-31, 19 N.W.2d at 801-02.
\textsuperscript{107} 221 Minn. 215, 21 N.W.2d 612 (1946).
was no "exposure occasioned by the nature of the employment" in that "the cause was in another and entirely separate department with which our employe had no connection."\textsuperscript{108} The trial judge agreed, saying, "Neither plaintiff nor those engaged in his particular trade contributed to the production of the irritating material."\textsuperscript{109} But the supreme court, throwing out the common-law action, disagreed, saying:

\begin{quote}
[I]t is evident that plaintiff contracted dermatitis while at his usual work on his employer's premises and within the scope of his employment; also that his affliction was caused by exposure to spun glass dust while so engaged.

The mere fact that plaintiff did not contribute to the production of the irritating material and did not actually work upon it does not negative defendant's liability under the compensation act to compensate him for the disability thus incurred. His affliction arose out of and in the course of his employment.

The obvious purpose of the 1943 act was to broaden the scope and enlarge the field within which such occupational risks were to be covered. We think the logical conclusion to be drawn is that the provision "arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment" refers to the hazards to which plaintiff was exposed in doing his work. Were this not so, it would be difficult to find an adequate reason for the adoption of the statute.\textsuperscript{110}
\end{quote}

The court then quoted from Connecticut cases construing a statute requiring the disease to be "peculiar to the occupation"\textsuperscript{111} (like Minnesota's statute\textsuperscript{112}), as not requiring "that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather . . . that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations,"\textsuperscript{113} and, further, as not precluding compensation merely

\textsuperscript{108.} Id. at 220, 21 N.W.2d at 615.
\textsuperscript{109.} Id.
\textsuperscript{110.} Id. at 221, 21 N.W.2d at 615-16.
\textsuperscript{111.} The Connecticut statute defined occupational disease as one "peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." See id. at 222, 21 N.W.2d at 616; Conn. Gen. Stat. Ann. § 31-275 (West Cum. Supp. 1979).
\textsuperscript{113.} Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 222, 21 N.W.2d 612,
"because the risk is one which has not become generally recognized or because only employees unusually susceptible will suffer from [the disease]." 114

Finally, the Sandy court concluded:

[Plaintiff contracted an occupational disease in the line of his work because of "a hazard characteristic of and peculiar to the trade, occupation, process or employment" in which he was engaged; the glass dust was the "direct and proximate cause" of his ailment; and, obviously, it was not a "hazard to which the workman would have been equally exposed outside of the employment." Therefore, so it seems to us, plaintiff's cause comes directly within the provisions of the 1943 act.

We have said time and again that the compensation law is remedial and, as such, should be given a liberal interpretation to the end that its purpose may thereby be attained. 115

In the 1957 case of Gray v. City of St. Paul, 116 the court upheld occupational disease coverage for a police officer's tuberculosis contracted after completing eight squad car shifts with a fellow officer later determined to have been suffering from a reactivated case of tuberculosis. The court first agreed with the employee's contention that the definition does not prohibit ordinary diseases of life, but only ordinary diseases of life to which the general public is equally exposed outside of employment; that therefore a so-called ordinary disease might very well be occupational if it meets the other requirements of the definition and if it can be shown that the general public was not equally exposed outside of the employment to the particular disease under consideration. 117

Then, after extensively reviewing the authorities and the medical evidence regarding the "superinfection" aspects of prolonged

616 (1946) (quoting Glodenis v. American Brass Co., 118 Conn. 29, 40, 170 A. 146, 150 (1934)).
114. Id. at 222, 21 N.W.2d at 616 (quoting LeLenko v. Wilson H. Lee Co., 128 Conn. 499, 505, 24 A.2d 253, 256 (1942)).
115. Id. at 223, 21 N.W.2d at 616. The court further stated:
Applicable here is what the Supreme Court of the United States recently said:
"The policy as well as the letter of the law is a guide to decision," and the process of interpretation "misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."
Id. (quoting Markham v. Cabell, 326 U.S. 404, 409 (1945)).
116. 250 Minn. 220, 84 N.W.2d 606 (1957).
117. Id. at 226, 84 N.W.2d at 610 (emphasis in original).
exposure in enclosed spaces, the court found the situation to square with the definition’s causation and peculiarity requirements:

Here the conditions of the employment proximately caused Gray to become infected with tuberculosis and therefore his disease was under the circumstances and in fact a natural incident of his employment. It was the special work environment differing from the ordinary exposure on the part of policemen wherein lay a hazard of contracting the disease far in excess of the hazard to which the ordinary policeman employee may be exposed. Since we think that this was a hazard distinguishable in character from the general run of occupations or that of the policeman ordinarily, therefore officer Gray’s tuberculosis as contracted was in fact “peculiar to his occupation.”

The court addressed the argument that its construction left no sound reason for the enactment of Minnesota Statutes section 251.051, providing compensation for tuberculosis contracted by a police officer “whose duties within the scope of his employment as a police officer bring him in contact or did bring him in contact with persons afflicted with tuberculosis,” after the facts of Gray arose, by saying:

The fact that the foregoing provision was enacted . . . is not controlling of the decision law in this state which holds that it is not required that a disease to be within the definition of an occupational disease should be one which arises solely out of the particular kind of employment in which the employee is engaged, but that it is enough if it is due to causes in excess of the ordinary hazards of that particular kind of employment.

The Gray court also spoke generally of the occupational disease

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118. See id. at 232, 84 N.W.2d at 614.

119. Id. at 234, 84 N.W.2d at 615.


121. 250 Minn. at 235, 84 N.W.2d at 616. It is not apparent why the court here and in the previous quotation seemingly construed the words in the first sentence of the definition, “due to causes in excess of the hazards ordinary of employment,” to require hazards exceeding those ordinary for claimant’s particular kind of employment, as opposed to hazards exceeding those that are ordinary for all types of employment in general. If the Legislature had meant that, it would have referred to “hazards ordinary of the employment.” Cf. Gillette v. Harold, Inc., 257 Minn. 313, 316, 101 N.W.2d 200, 203 (1960) (“due to causes in excess of the hazards of that employment”) (emphasis added).
definition, adopting a three-part formulation that had been urged by one of the parties in *Sandy*:122

The purpose and intent of the legislature must have been to liberalize the approach in consideration of occupational diseases intending to cover those (1) arising out of the employment, (2) where there is found to be a direct causal connection between the conditions under which the work is performed and the disease, and (3) that if the disease follows as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, it may be classed as an occupational disease.

... [W]e think it clear that the legislature has been in accord with this court's interpretation of the occupational disease provisions of our Workmen's Compensation Law as announced both in the Hunter and Sandy cases which provide and establish a liberal construction of those provisions. Legislative acquiescence therein has resulted in constituting our present occupational disease provision free from further amendments since the advent of the Hunter and Sandy cases.123

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122. *See* Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. at 220, 21 N.W.2d at 615.

123. Gray v. City of St. Paul, 250 Minn. at 234-35, 84 N.W.2d at 615-16. *Compare id.* with MINN. STAT. § 645.17(4) (1978) (derived from Act of Apr. 28, 1941, ch. 492, § 17, 1941 Minn. Laws 907, 912), which provides:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

(4) When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language....

Even before section 645.17(4)'s enactment, the court had held that the Legislature's reenactment of language construed by the court adopted the court's construction even though there was "little room for doubt that the construction diametrically opposed the purpose of the lawmakers." *See* Carmody v. City of St. Paul, 207 Minn. 419, 423-25, 291 N.W. 895, 897-98 (1940) (reenactment of key language in section 176.135(1) adopted court's construction regarding employee's right to select doctor); cf. McCourtie v. United States Steel Corp., 253 Minn. 501, 510, 93 N.W.2d 552, 559 (1958) (Legislature's 1953 reenactment of language in section 176.061(4) manifested intent that court's "common activities of the employees test" be applied). *See also* MINN. STAT. § 482.09(10) (1978) (derived from *Act of Mar.* 1, 1957, ch. 65, § 1, 1957 Minn. Laws 78, *as amended by Act of Apr.* 24, 1959, ch. 579, § 3, 1959 Minn. Laws 934, *as amended by Act of Apr.* 9, 1974, ch. 406, § 73, 1974 Minn. Laws 747, 756), which provides:

[T]he revisor of statutes, to the extent that personnel and availability of appropriations permit, shall:

(10) Report to the legislature by November 15 of each even numbered year any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota filed during the two-year period immediately preceding September 30 of the year preceding the year
Ten years after *Gray*, the Minnesota Supreme Court decided a factually similar case, but reached a different result. In the 1967 case of *Parle v. Henry Boos Dental Laboratories, Inc.*, the court held as a matter of law that the disease was not an occupational disease. The court reversed an award for tuberculosis contracted by associating with tuberculous co-workers in a large, well-ventilated laboratory. Claimant associated with two of the co-workers only sporadically—during coffee breaks, at lunch, and on the elevators—but she worked in the same area ten or twenty feet from a third infected co-worker. The court first distinguished *Gray* as follows:

Unlike the working conditions which confronted Officer Gray which required that he be closely confined for long periods of time in immediate proximity to an infected employee, Mrs. Osmonson's work area was in a large well-ventilated laboratory where she sat some distance from other employees. Her disability resulted entirely from exposure to an infected employee and was in no way connected with the hazards inherent in the employment.

Apparently not satisfied with thus distinguishing *Gray*, the court proceeded to say:

Our decision in the *Gray* case reflects a solicitous legislative concern for police officers because they are more likely to be exposed to a stratum of society which is peculiarly susceptible to disease than is the public generally. [Footnote: "Minn. St. 251.051."] The ruling in that case is limited to the unusual circumstances which there existed.

It is hard to see how the *Gray* decision reflected a "solicitous legislative concern for police officers" in light of the fact that section 251.051 was enacted after *Gray*'s facts arose. Furthermore, the *Gray* court had to contend with the argument that enactment of section 251.051 militated against the court holding the occupational disease definition applicable to Officer Gray. It is not ap-
parent why the Parle court gave such grudging treatment to the Gray case decided only ten years earlier.

The nub of the Parle opinion was the following:

The facts of the instant case do not permit a finding that Mrs. Osmonson's disability resulted from a disease "recognized as a hazard characteristic of and peculiar to the trade," or from a cause "in excess of the hazards ordinary of employment" within the meaning of § 176.011, subd. 15. There was no evidence that the nature of her duties or the conditions under which she was required to work had any connection with her contracting tuberculosis. Her disability resulted from an exposure which might as readily have occurred outside of her employment. It was not peculiar to her occupation. 131

Again, seeing the need for additional justification, the Parle opinion quoted at length from a New York case 132 that denied compensation on similar facts. The quotations included not only statements such as, "No peculiarity of claimant's job induced the disease or heightened the chance of infection," 133 but statements indicating that an occupational disease must result from "generally recognized hazards incident to a particular employment" 134 and that the disease "must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question. There must be a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort." 135 The Parle court stated that it found the New York court's reasoning persuasive and reversed the award of compensation. 136

The Parle court's result, and its distinguishing of the facts in Gray, 137 are appropriate but its embracing of the New York decision's language is questionable. The language indicating that the hazard must be generally recognized or commonly regarded as an incident of the employment is inconsistent with language from the

131. 278 Minn. at 210, 153 N.W.2d at 346.
134. Id. (quoting Harman v. Republic Aviation Corp., 298 N.Y. 285, 290, 82 N.E.2d 785, 788 (1948)).
135. Id. at 211, 153 N.W.2d at 346 (quoting Harman v. Republic Aviation Corp., 298 N.Y. 285, 286, 82 N.E.2d 785, 786 (1948)).
136. See id. at 212, 153 N.W.2d at 347.
137. See text accompanying notes 127 and 131 supra.
Connecticut case quoted with approval in Hunter, Sandy, and Gray, inconsistent with some of the Minnesota court’s results, and unwarranted by the words of Minnesota’s occupational disease definition. The language requiring the disease to be linked with a feature of the claimant’s job that is “common to all jobs of that sort” is inconsistent with Sandy’s result, in that exposure to spun glass insulation dust was by no means common to all machinists.

Finally, a 1975 compensation court decision provides some further elaboration upon the occupational disease definition. In Fehling v. Dayton Rogers Manufacturing Co., the compensation court held that an employee’s hearing loss from factory noise was an occupational disease so that time for notice of the claim was governed by the two-year (now three-year) occupational disease rather than the ninety-day (now 180-day) personal injury provi-


There is nothing in the terms of our statutory definition of an occupational disease which suggests that to fall within it a disease must be one which is a usual or generally recognized incident of the employment . . . . Further, occupational diseases ordinarily incapacitate only a small proportion of the employees subjected to the risk and if this were not so economic considerations would require a change in conditions to obviate the risk or an abandonment of the employment.

Id.

139. See note 114 supra; notes 206-07 infra and accompanying text.

140. See notes 212-14 infra and accompanying text.

141. See note 205 infra and accompanying text.

142. For further discussion, see notes 163-75 infra and accompanying text.


144. 28 Minn. Workers’ Comp. Dec. 35 (1975).

145. See MINN. STAT. § 176.151(4) (1978), which provides:

In the case of injury caused by x-rays, radium, radioactive substances or machines, ionizing radiation, or any other occupational disease, the time limitations otherwise prescribed by Minnesota Statutes 1961, Chapter 176, and the acts amendatory thereof, shall not apply, but the employee shall give notice to the employer and commence his action within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability.

Id. (emphasis added) (The period was extended from two to three years by Act of June 4, 1975, ch. 359, § 17(2d), 1975 Minn. Laws 1168, 1186.).
sion.146 *Fehling* quoted the occupational disease definition and said:

Thus, from the statute itself, we see that one of the characteristics common to "occupational disease" is that it is peculiar to the occupation. Another common element is that an occupational disease is something that naturally and reasonably can be expected to result to the employee in that type of employment. And as a corollary, all of the employees within the same environment are generally equally exposed to the same hazard. Also, any occupational disease is generally something that develops gradually over a long period of time instead of suddenly and violently.

Although counsel for the insurer argues that occupational hearing loss occurring over a long period of time constitutes a personal injury because of the constant trauma effected by the continuing noise waves, it is clear that occupational loss of hearing has most of the characteristics listed, supra, for disease and more logically falls within that classification.147

Although these cases construing the occupational disease definition do not engage in detailed analysis of the statute's various provisions, some insight into the meaning of occupational disease is provided. By applying the definition to the facts and circum-

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146. See MINN. STAT. § 176.141 (Supp. 1979), which provides:

Unless the employer has actual knowledge of the occurrence of the injury or unless the injured worker, or the dependent or someone in behalf of either, gives written notice thereof to the employer within 14 days after the occurrence of the injury, then no compensation shall be due until notice is given or knowledge obtained. If the notice is given or the knowledge obtained within 30 days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation unless the employer shows that he was prejudiced by such want, defect, or inaccuracy, and then only to the extent of the prejudice. If the notice is given or the knowledge obtained within 180 days, and if the employee or other beneficiary shows that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of the employer or agent, then compensation may be allowed, unless the employer shows that he was prejudiced by failure to receive the notice, in which case the amount of compensation shall be reduced by a sum which fairly represents the prejudice shown. Unless knowledge is obtained or written notice given within 180 days after the occurrence of the injury no compensation shall be allowed, except that an employee who is unable, because of mental or physical incapacity, to give notice to the employer within 180 days from the injury shall give the prescribed notice within 180 days from the time the incapacity ceases.

*Id.* (The period was extended from 90 to 180 days by Act of May 27, 1977, ch. 342, § 19, 1977 Minn. Laws 697, 711, and the exception in the last sentence was added by Act of June 7, 1979, ch. 3, § 47, 1979 Minn. Laws Ex. Sess. 1256, 1286.)

stances involved in each case, the court gives some idea of what is a compensable occupational disease. The cases are clarified further when their effects are examined in the following detailed consideration of the statute.

C. Analysis of the Occupational Disease Definition

With sentences and clauses enumerated, the definition looks like this:

(1) “Occupational disease”
   (a) means a disease
       (i) arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and
       (ii) due to causes in excess of the hazards ordinary of employment and
   (b) shall include undulant fever.

(2) Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except
   (a) where the diseases follow as an incident of an occupational disease, or
   (b) where the exposure peculiar to the occupation makes the disease an occupational disease hazard.

(3) A disease arises out of the employment only
   (a) if there be a direct causal connection between the conditions under which the work is performed and
   (b) if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment.

148. It seems the words “and the disease” should have been included at this point. This was suggested by the employee in Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 220, 21 N.W.2d 612, 615 (1946), and the court so construed this provision in Gray v. City of St. Paul, 250 Minn. 220, 234, 84 N.W.2d 606, 615 (1957). The fact that the statute is grammatically improper, or missing necessary words, however, does not mean that the definition is without force and cannot be applied. See Minn. Stat. § 645.18 (Supp. 1979):

Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence is without a meaning as it stands. Words and phrases which may be necessary to the proper interpretation of a law and which do not conflict with its obvious purpose and intent nor in any way affect its scope and operation may be added in the construction thereof.

149. It seems the word “occupational” should not have been included at this point. It is not included in the formulation discussed in Gray v. City of St. Paul, 250 Minn. 220, 234, 84 N.W.2d 606, 615 (1957).
(4) An employer is not liable for compensation for any occupational\textsuperscript{150} disease
(a) which
(i) cannot be traced to the employment as a direct and proximate cause and
(ii) is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or
(b) which results from a hazard to which the worker would have been equally exposed outside of the employment.\textsuperscript{151}

Apart from part (1)(a)(i)'s "in the course of employment" requirement,\textsuperscript{152} part (1)(b)'s curious reference to undulant fever,\textsuperscript{153} and part (2)(a)'s coverage of ordinary diseases of life that follow as an incident of an occupational disease,\textsuperscript{154} all the definition really says is that a disease is an occupational disease if (1) the employment (2) increased the risk of and (3) proximately caused (4) the disease.\textsuperscript{155}

\section{The Employment}

It seems fair to read the definition as requiring "the employ-
ment” to increase the risk of and proximately cause the disease. The statute’s other references—“occupation,” “trade,” and “process”—seem identical in meaning, and the words “the conditions under which the work is performed” or “the nature of the employment” really are no more restrictive than the term “employment.”

The cases show that the focus should be upon the employee's particular employment, with all of its conditions and incidents, not upon broad occupational categories. For example, when a machinist contracted dermatitis, the focus was not upon machinists in general, but upon a ship machinist working in areas where there was a great amount of spun glass dust from insulation. Similarly, when an electrical maintenance worker contracted ischemic neuritis, the focus was not upon electrical maintenance workers in general, but upon one who had to work standing in cold water during a flood. In fact, in the latter case the only medical expert testified, “It is not an occupational disorder. You do not find it ordinarily in electricians.” Nevertheless, compensation was given on the basis of his further testimony that “the probable cause was this working in cold waters, and having his feet constantly cold during the period of his working day after day.”

Unfortunately, the Minnesota court in Parle v. Henry Boos Dental Laboratories, Inc. introduced confusion into this area by quoting with approval language from a New York case that included the statement, “There must be a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs

156. See parts (3)(b), (4)(a)(i), (4)(b). In addition, (1)(a)(i), (2), and (4)(a)(ii), all specify “employment.”
157. See parts (1)(a)(i), (2)(b), and (4)(a)(ii).
158. See part (4)(a)(ii).
159. See id.
160. See part (3)(a) (emphasis added).
161. See part (3)(b) (emphasis added).
162. See notes 215-21 infra and accompanying text.
163. See Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 21 N.W.2d 612 (1946). The court said, “The mere fact that [employee] . . . did not contribute to the production of the irritating material and did not actually work upon it does not negative [employer’s] . . . liability under the compensation act to compensate him for the disability thus incurred.” Id. at 221, 21 N.W.2d at 615-16.
165. Id. at 96.
166. Id.
167. 278 Minn. 207, 153 N.W.2d 344 (1967).
This language indicates that a relationship between the disease and all similar jobs, rather than the individual worker’s specific job, will be required. This statement was not crucial to the holding in either Parle or the New York case, both of which involved contraction of tuberculosis from a coemployee in a large, well-ventilated workplace. As the Parle court noted, contraction of the disease “might as readily have occurred outside [claimant’s] employment.” This consideration alone justified reversing the compensation award in Parle.

But the statement was picked up and utilized by the compensation court in a case in which it was crucial (albeit only on the issue of reimbursing the employer from the special fund). In Atkins v. Page Bros., a business manager who suffered a heart attack as a result of job stress was found not to have contracted an occupational disease. The compensation court reasoned:

[W]e can find no “recognizable link between the disease and some distinctive feature of the claimant’s job, common to all jobs of that sort.” . . . The alleged “link” was the stress of the job on Atkins because of the failure of the business. This stress, however, was not common to all jobs of that sort except insofar as it may be common to all jobs of all sorts.

Under a former statute, special fund reimbursement was barred for occupational disease. Act of May 6, 1965, ch. 327, § 1(7), 1965 Minn. Laws 463, 464, provided, “Under subdivisions 1 and 2, occupational disease shall not be deemed to be the personal (second) injury.” In 1973, this was amended to provide:

Under subdivisions 1 and 2, an occupational disease may be deemed to be the personal (second) injury.

If the subsequent disability for which reimbursement is claimed is an occupational disease, and if, subsequent to registration as provided by subdivisions 4 and 5, the employee has been employed by the employer in employment similar to that which initially resulted in such occupational disease, no reimbursement shall be paid to the employer.


In Atkins, compensability was conceded, see 24 Minn. Workmen’s Comp. Dec. at 504, and the employee was found to have suffered a “personal injury.” Id. at 507-08.

Id. at 507 (emphasis added). The compensation court distinguished compensation for firemen’s coronary sclerosis (covered by the presumption discussed at notes 52-59
This reasoning clearly conflicts with the approach of other Minnesota Supreme Court and compensation court decisions. The compensation court in *Atkins* should have focused upon the particular conditions and incidents of Atkins’ job, rather than rejecting compensability on the basis that severe stress was not common to all business managers. The *Atkins* approach would deny recovery to an employee whose special assignment exposed him to extrahazardous conditions unusual in the industry.\(^{175}\) *Atkins* is an anomaly among Minnesota decisions and should not be followed.

### 2. Increased Risk

The definition of occupational disease insists that the employment “increase the risk” of the disease by requiring:

1. the disease to arise out of employment,\(^{176}\)
2. the disease to be “peculiar to the occupation in which the employee is engaged,”\(^{177}\)
3. the disease to be “due to causes in excess of the hazards ordinary of employment,”\(^{178}\)
4. an ordinary disease of life to which the general public is equally exposed outside of employment to be from an “exposure peculiar to the occupation,”\(^{179}\)

\(^{175}\) *Cf.* Reierson v. Land O’Lakes Creameries, Inc., 287 Minn. 179, 177 N.W.2d 301 (1970), in which the court upheld compensation for dermatomyositis, a disease “characterized by muscular weakness with a nonspecific eczematous skin eruption or urticaria.” *Id.* at 181, 177 N.W.2d at 303. The court upheld a finding that claimant contracted this disease while cleaning a pit area that contained various types of grain and dust, dirt, dead rats and mice, poisons, and other debris accumulated over many years. *Id.* at 180-83, 177 N.W.2d at 302-04. The place was so filthy employees could only work there for two hours and had to come out from time to time. *Id.* at 180, 177 N.W.2d at 302.

\(^{176}\) See part (1)(a)(i).

In Minnesota, the “arising out of” requirement in the definition of “personal injury,” MINN. STAT. § 176.011(16) (1978), must be satisfied under either the increased-risk test or the street-risk doctrine. See Auman v. Breckenridge Tel. Co., 188 Minn. 256, 259-60, 246 N.W. 889, 890 (1933). Diseases would not seem to fit under the street-risk doctrine as “originating upon,” “connected with,” or “referable to the use of public ways.” See id.; A. LARSON, *supra* note 18, § 9.50 (1978).

\(^{177}\) See part (1)(a)(i).

\(^{178}\) See part (1)(a)(ii).

\(^{179}\) The Minnesota definition of “ordinary diseases of life” is much more liberal than that of most other states with provisions specifically referring to such diseases. Apart from when that kind of disease follows “as an incident of an occupational disease,” see note 154 *supra*, most of those states purport to exclude absolutely “ordinary diseases of life to which the general public is exposed.” See ARK. STAT. ANN. § 81-1314(a)(5)(iii) (1976); GA.
(5) the disease to be "recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment," and

(6) the disease to result otherwise than "from a hazard to which the worker would have been equally exposed outside of the employment."
It might be contended that the definition adopts a standard more stringent than "increased risk" by requiring that a compensable disease be "peculiar to the occupation in which the employee is engaged," or result from an exposure "peculiar to the occupation" if it is an ordinary disease of life to which the general public is equally exposed outside of employment. Thus, Professor Lar-
son refers to the “peculiar-risk doctrine, which in the early dawn of American compensation law was . . . the dominant rule” for determining whether an injury arose out of employment,\textsuperscript{184} as being stricter than the increased-risk doctrine. Under the peculiar-risk doctrine:

the claimant had to show that the source of the harm was in its nature peculiar to his occupation. Accordingly, even if his work subjected him to a tremendously increased quantitative risk of injury by heat, or cold, or lightning, the claimant might be turned away with the comment that “everyone is subject to the same weather.”\textsuperscript{185}

By contrast, under the increased-risk doctrine, “the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment.”\textsuperscript{186}

But “peculiar” need not be interpreted in a strict fashion. It may be interpreted to mean that the risk of disease merely must be “increased” by rather than “unique” to the occupation. The relevant dictionary definitions of “peculiar”\textsuperscript{187} show such an interpretation is permissible.

Indeed, the Minnesota court seemingly equated “peculiar” risk with “increased” risk in an injury case when it said:

Relators assert that respondent's injuries did not arise out of the employment on the further ground that the hazard from which the accident resulted was not “peculiar to the work,” but was “common to the neighborhood.” . . . Caution must be used in applying the words “peculiar to the work” so that they do not become a mere verbal shield against liability. . . . A hazard which is common to the neighborhood may nevertheless become so localized and peculiar to the place and nature of the employment that an employe is necessarily exposed to a different and greater risk than if he had been pursuing his ordinary personal affairs, and as a result any injury sustained therefrom

\textsuperscript{184} 1 A. Larson, \textit{supra} note 18, § 6.20 (1978).

Minnesota appears never to have embraced the peculiar-risk approach. \textit{See} \textit{State ex rel. Peoples Coal & Ice Co. v. District Court}, 129 Minn. 502, 504, 153 N.W. 119, 119 (1915) (injury “need not . . . be one peculiar to the particular employment”).

\textsuperscript{185} 1 A. Larson, \textit{supra} note 18, § 6.20 (1978).

\textsuperscript{186} \textit{Id.} § 6.30 (emphasis in original).

\textsuperscript{187} “[B]elonging exclusively or esp. to a person or group, . . . tending to be characteristic of one only: DISTINCTIVE, . . . different from the usual or normal: SINGLE, SPECIAL, PARTICULAR . . . .” \textit{Webster's Third New International Dictionary of the English Language Unabridged} 1663 (1976) (emphasis added).
is incidental to the employment and compensable. 188

"Peculiar" should be construed as referring to a risk "increased" by the employment rather than a risk "unique" to the employment. Probably no disease is unique to a particular occupation, and almost certainly no occupation involves a unique exposure to an ordinary disease of life. Accordingly, the Legislature could not have intended "peculiar" to mean "unique" in this context. 189

Construing "peculiar" to refer to a risk "increased" by rather than "unique" to the occupation avoids the conflict that otherwise would exist between the requirements that the disease be peculiar to the occupation and, in the case of an ordinary disease of life, that the exposure be peculiar to the occupation. 190 The risk of a disease would be "increased" by the occupation if the exposure was "peculiar" to (increased by) the occupation.

Thus, on several occasions the Minnesota court, like a number of other state courts, 191 has quoted the following from a Connecticut case:

The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations. . . . 192


189. See Minn. Stat. § 645.17 (1978), which provides in part:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

(1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable;

(2) The legislature intends the entire statute to be effective and certain.

190. See Minn. Stat. § 645.26(1) (1978), which provides in part, "When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both."


192. Glodenis v. American Brass Co., 118 Conn. 29, 40, 170 A. 146, 150 (1934) (quoted with approval in Gray v. City of St. Paul, 250 Minn. 220, 227, 84 N.W.2d 606, 611 (1957), Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 222, 21 N.W.2d 612,
Professor Larson agrees that "peculiar" should not be construed to mean "unique"—in fact he calls it "a preposterous distortion of the concept of occupational disease" to require a showing that the disease is not found in other industries and occupations. 193

Minnesota case law supports Professor Larson's conclusion by finding occupational disease coverage for diseases that plainly were not unique to the employment—bursitis or synovitis suffered by a "slagger,"194 dermatitis suffered by a machinist,195 ischemic neuritis suffered by an electrical maintenance man,196 carpal tunnel syndrome suffered by a carpet layer,197 and pulmonary emphysema suffered by an auto dealer's car starter.198

Accordingly, the Alaska court correctly equated "peculiar" risk with "increased" risk, saying, "these conditions were peculiar to her employment—that is, the risk of her contracting contact dermatitis was present to a greater degree than is found in employment and living conditions in general."199

The Alaska court's interpretation of "peculiar" is consistent with Gillette v. Harold, Inc.,200 in which the Minnesota court, upholding "personal injury"201 coverage for a sales clerk's aggravation202 of her

616 (1946), and Hunter v. Zenith Dredge Co., 220 Minn. 318, 332, 19 N.W.2d 795, 802 (1945)).
193. 1B A. LARSON, supra note 18, § 41.33, at 7-369 n.38.
194. 2See Hunter v. Zenith Dredge Co., 220 Minn. 318, 19 N.W.2d 795 (1945). "The medical experts . . . testified that the disease was peculiar to any occupation wherein either the knees or the elbows of a worker were required to come in constant contact with cold, hard surfaces . . . ." Id. at 331, 19 N.W.2d at 802 (emphasis added).
195. 2See Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 216, 21 N.W.2d 612, 613 (1946) (disease resulted from working in an area where there was a great deal of spun glass dust from insulation installed by others).
198. 2Scott v. Southview Chevrolet Co., 267 N.W.2d 185, 186-87 (Minn. 1978) (exhaust fumes).
199. 2Aleutian Homes v. Fischer, 418 P.2d 769, 778 (Alaska 1966); see Note, supra note 16, at 79 n.13, in which it is stated:
   The courts have described occupational diseases as those that are "incident to," . . . or "normally peculiar to," . . . the occupation or employment. This is the practical equivalent of saying that the disease must be the result of an increased risk from the particular type of employment, but it does not mean that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged.
   Id. (footnotes omitted).
200. 2257 Minn. 313, 101 N.W.2d 200 (1960).
202. Aggravation resulted from sales clerk duties requiring her "to be on her feet
preexisting foot condition, observed that the preexisting condition was not an occupational disease because there was "nothing in the record to sustain a finding that this condition is peculiar to the occupation of a saleslady." Since the underlying condition was a deteriorative disorder and "no evidence" indicated that it "was in any way caused by her employment," there was a plain lack of proof that risk of the underlying condition was "increased" by the occupation.

b. "Recognized" as Characteristic and Peculiar Hazard

One might argue that the definition uses a stricter standard than increased risk by requiring the disease to be "recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment." But this does not appear to be the case.

First, it is noteworthy that the provision does not require the disease to be generally recognized as a hazard characteristic of and peculiar to the employment. Thus, in three cases the Minnesota court quoted with approval language from a Connecticut decision saying:

If . . . a disease is the natural result of conditions which are inherent in the employment and which attach to that employment a risk of incurring it in excess of that attending employment in general, an award of compensation is not precluded because the risk is one which has not become generally recog-

The "peculiar" concept is discussed in notes 182-204 supra and accompanying text. What is said there applies also to "characteristic of." As noted in the third and fourth paragraphs of note 182 supra, a number of states' statutes require either the "causes and conditions" producing the disease or the "hazards" of the disease to be "characteristic of and peculiar to" the employment. Maine, which requires the disease to be "due to causes and conditions which are characteristic of a particular trade, occupation, process or employment," ME. REV. STAT. tit. 39, § 183 (1978), seems to have the only provision which uses the term "characteristic" unaccompanied by the term "peculiar."

Only two states join Minnesota in using the phrase, "caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment." See ALA. CODE § 25-5-10 (1975); S.C. CODE § 42-11-10 (1977).

203. Id. at 316, 101 N.W.2d at 203.
204. Id. at 314-15, 101 N.W.2d at 202.
205. See part (4)(a)(ii) (emphasis added).

In one of these Minnesota cases, the court quoted with approval additional language from the same Connecticut case:

We cannot import into the conception of occupational disease under our law the element that the disease must be a usual or generally recognized incident of the employment. Occupational diseases result ordinarily in incapacity in a relatively small proportion of the number of employees subjected to the risk; indeed, if this were not so, economic considerations would require an abandonment of the employment or a change in its conditions to obviate the risk.

Further, in two of the Minnesota cases, the court indicated that after-the-fact recognition of the hazard is sufficient, by quoting with approval the following from the same Connecticut decision:

When we referred in [prior cases] to disease as being a "natural" incident of the employment, we used that word in the sense that we have used it in defining proximate causation; it imports not a forward look to determine what risks should have been foreseen, but a tracing back from the results to the circumstances out of which [the disease] sprang.

The cases' results bear this out by granting occupational disease compensation although tuberculosis is not generally recognized as a

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The occupational disease provisions of thirteen states—Arizona, Illinois, Indiana, Iowa, Kentucky, Missouri, Nevada, New Mexico, North Dakota, Tennessee, Utah, Virginia, and West Virginia—specify that the disease need not "have been foreseen or expected," and all of those except Tennessee, Virginia, and West Virginia further specify that the disease's employment connection need appear only "after its contraction." See note 223 infra.
hazard characteristic of and peculiar to employment as a police officer assigned to squad car duty,212 pulmonary emphysema is certainly not generally recognized as a hazard characteristic of and peculiar to employment as an auto dealer’s car starter,213 and ischemic neuritis is not generally recognized as a hazard characteristic of and peculiar to employment as an electrical maintenance man working in cold water during a flood.214

It is appropriate that this “recognition” requirement has not been strictly interpreted and applied. It should not be construed as requiring widespread recognition. After-the-fact recognition of the disease as a hazard of the employment should be sufficient.

c. Increased Over What?

Under the increased-risk test applicable to “personal inju-

212. See Gray v. City of St. Paul, 250 Minn. 220, 84 N.W. 2d 606 (1957). It should be noted that Gray’s facts arose prior to Act of Apr. 5, 1955, ch. 340, § 1, 1955 Minn. Laws 500, 500 (codified at MINN. STAT. § 251.051 (1978)), providing compensation to police officers contracting tuberculosis after their duties bring them in contract with persons afflicted with tuberculosis. Cf. 1B A. LARSON, supra note 18, § 41.40, at 7-394 (“Ordinarily one would not think of tuberculosis as an occupational disease of telephone operators.”) (referring to Mason v. Y.W.C.A., 271 A.D. 1042, 68 N.Y.S.2d 510, leave to appeal demed, 297 N.Y. 1037, 74 N.E.2d 486 (1947)). In Mason, compensation was awarded for tuberculosis contracted from using the same telephone mouthpiece as a tuberculous co-worker.


214. See Sinclair v. Frye, 18 Minn. Workmen’s Comp. Dec. 93 (1954). In fact, the sole medical witness “testified that during his forty years of practice he had never come across a case like [this]; but by elimination of all other known causes, he reached the diagnosis of ischemic neuritis and established causal relationship with the work the man had been doing in his employment.” Id. at 96.

Other jurisdictions also find occupational disease coverage for diseases not generally recognized as hazards characteristic and peculiar to the employment. For example, in Bowman v. Twin Falls Constr. Co., 99 Idaho 312, 322, 581 P.2d 770, 780 (1978), the court ordered occupational disease compensation for pulmonary emphysema contributed to by a road construction employee inhaling dust at work notwithstanding medical testimony that “certainly we do not, with any impressive degree, find heavy equipment operators routinely developing emphysema. It’s not that common a problem with them.” Id. (emphasis in original).

In Stepnowski v. Specific Pharmaceuticals, Inc., 18 N.J. Super. 495, 87 A.2d 546 (1952), a finding of occupational disease coverage was upheld for a chemical plant worker’s “effemination” and impotency caused by inhaling and absorbing stilbestrol dust particles containing female sex hormones “without regard to whether the risk of the disease was generally known.” Id. at 499, 87 A.2d at 548.

In State ex rel. Ohio Bell Tel. Co. v. Krise, 42 Ohio St. 2d 247, 254, 327 N.E.2d 756, 761 (1975), the court upheld occupational disease compensation for histoplasmosis contracted by a telephone repairman because of work exposing him to frequent contact with pigeon droppings and dead pigeons.
ries,"215 the Minnesota Supreme Court has required the employment to increase the risk of injury beyond that confronted by the public generally216 or the employee apart from work.217

The occupational disease definition, on the other hand, requires the risk of disease to be increased beyond "hazards ordinary of employment"218 and beyond hazards "to which the worker would have been equally exposed outside of employment."219 Further, in regard to an ordinary disease of life, the worker's exposure to the disease must be increased beyond that of "the general public . . . outside of employment."220

The definition's specification of norms apparently will not make its increased-risk approach operate differently from the judicially created increased-risk test used for personal injuries. Since employments are so varied, "hazards ordinary of employment" is not really a more demanding norm than requiring greater risk than that faced by the public generally or the employee apart from work—the personal injury norms. As pointed out by Professor Larson:

The infinite variety of conditions of other employment—ranging from accounting to lead mining and from baby-sitting to topping Douglas fir trees—is just as great as the variety of conditions of nonemployment life, and has no more of a common element than does "everyday life" to supply a measuring stick

215. See note 176 supra.
216. See Lickfett v. Jorgenson, 179 Minn. 321, 323, 229 N.W. 138, 138 (1930) ("not . . . the same as the public generally"); State ex rel. People's Coal & Ice Co. v. District Court, 129 Minn. 502, 503, 153 N.W. 119, 119 (1915) ("more than the normal risk to which all are subject").

In Hough v. Drevdahl & Son Co., 281 N.W.2d 690 (Minn. 1979) (per curiam), the court upheld a determination that a truck driver's heart trouble from stress was not a compensable personal injury or occupational disease because the compensation court could find that the work stress "was not significantly different from the stress to which ordinary living exposes everyone." Id. at 692.

217. See Snyder v. General Paper Corp., 277 Minn. 376, 385, 152 N.W.2d 743, 749 (1967) (greater "than if he had been pursuing his ordinary personal affairs"); Olson v. Trinity Lodge No. 282, A.F. & A.M., 226 Minn. 141, 147, 32 N.W.2d 255, 259 (1948) (same); Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 289, 193 N.W. 466, 467 (1923) (not "equally exposed to the same danger apart from his employment").

218. Part (1)(a)(ii) specifies, "'Occupational disease' means a disease . . . due to causes in excess of the hazards ordinary of employment."
219. Part (4)(b) specifies, "An employer is not liable for compensation for any occupational disease . . . which results from a hazard to which the worker would have been equally exposed outside of the employment."

220. Part (2) provides, with certain exceptions, "Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable . . . ."
by which to judge what is "ordinary" and what is distinctively occupational in a particular employment.  

Similarly, requiring the employee to show that employment increased the risk beyond both that of employment in general and himself apart from work (and, in case of an ordinary disease of life, beyond that of the general public) probably would not be more difficult than showing an increase beyond one of these norms.

3. **Proximate Cause**

The definition necessitates that the employment proximately caused the disease by requiring:

1. "a direct causal connection between the conditions under which the work is performed" and the disease,

2. the disease to follow "as a natural incident of the work as a result of the exposure occasioned by the nature of the employment," and

221. IB A. LARSON, supra note 18, § 41.33, at 7-365.

222. Part (3)(a) specifies, "A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed ..." Regarding the inferred addition of the words "and the disease," see note 148 supra.

Twelve states join Minnesota in requiring a "direct causal connection between the conditions under which the work is performed" and the disease. See ARIZ. REV. STAT. ANN. § 23-901.01(1) (Supp. 1971-1979); GA. CODE ANN. § 114-803(5)(a) (1973); IND. CODE ANN. § 22-3-7-10(b) (Burns 1974); MO. ANN. STAT. § 287.067(1) (Vernon 1965); MONT. CODE ANN. § 39-72-408(1) (1979); NEV. REV. STAT. § 617.440(1)(b) (1977); N.M. STAT. ANN. § 52-3-32 (1978); N.D. CENT. CODE § 65-01-02(9)(a) (Supp. 1979); TENN. CODE ANN. § 50-1101(6) (Cum. Supp. 1979); UTAH CODE ANN. § 35-2-26 (1974); VA. CODE § 65.1-46 (1973); W. VA. CODE § 23-4-1 (1978).

Five other states also refer to "direct" causation. See ALA. CODE § 25-5-110(1) (1975) (disease must be "caused ... as a direct result of exposure over a period of time to the normal working conditions of such trade, process, occupation or employment"); COLO. REV. STAT. § 8-41-108(3) (Cum. Supp. 1978) (disease must result "directly from the employment or the conditions under which work was performed"); IOWA CODE ANN. § 85A.8 (West Cum. Supp. 1979) (disease must "have a direct causal connection with the employment"); MISS. CODE ANN. § 71-3-7 (1972) (must be "a direct causal connection between the work performed and the occupational disease"); S.C. CODE § 42-11-10 (1976) (disease must be "caused ... as a direct result of continuous exposure to the normal working conditions" of the employment and must "result directly and naturally from exposure in this State to the hazards peculiar to the particular employment").

223. Part (3)(b) specifies, "A disease arises out of the employment only ... if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment."

A number of states' provisions are quite similar in requiring that the disease be a natural incident of the work as a result of the exposure occasioned by the nature of the employment. See ARIZ. REV. STAT. ANN. § 23-901-01(2) (Supp. 1971-1979); COLO. REV. STAT. § 8-41-108(3) (Cum. Supp. 1978); GA. CODE ANN. § 114-803(5)(b) (1973) (disease...
the disease to be traceable "to the employment as a direct and proximate cause."224

The personal injury definition,225 by contrast, requires only an injury "arising out of" employment. The Minnesota court remarked upon this in a 1941 case, Hanson v. Robitshek-Schneider


A number of the provisions already cited further require the disease to appear "to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence." See ARIZ. REV. STAT. ANN. § 23-901.01(6) (Supp. 1971-1979); GA. CODE ANN. § 114-803(5)(e) (1973); UTAH CODE ANN. § 35-2-26 (1974); VA. CODE § 65.1-46 (1973); W. VA. CODE § 23-4-1 (1978); cf. TENN. CODE ANN. § 50-1101(5) (Cum. Supp. 1979) (substantially same). The Arizona, Nevada, New Mexico, and Utah provisions specify that the disease must appear "after its contraction" and, together with the Tennessee, Virginia, and West Virginia provisions, add that the disease "need not have been foreseen or expected."

A number of states' provisions, similar except in referring to "rational" instead of "natural consequence," specify that the disease need not "have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence." See IND. CODE ANN. § 22-3-7-10(b) (Burns 1974); MO. ANN. STAT. § 287.067(1) (Vernon 1965); N.D. CENT. CODE § 65-01-02(8)(a) (Supp. 1979); cf. ILL. ANN. STAT. ch. 48, § 172.36(d) (Smith-Hurd Cum. Supp. 1979) (same except origin "or aggravation"); IOWA CODE ANN. § 85A.8 (West Cum. Supp. 1979) (same except "resulted" from that source as an "incident and rational consequence"); KY. REV. STAT. § 342.620(2)(a) (1977) (same except "be related to" instead of "have had its origin in"); KAN. STAT. ANN. § 44-5a01(b) (Cum. Supp. 1979) ("The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk.").

224. Part (4)(a)(i) specifies, "An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause. . ."

Twelve states' provisions similarly require that the disease "can be fairly traced to the employment as the proximate cause." See ARIZ. REV. STAT. ANN. § 23-901.01(3) (Supp. 1971-1979); COLO. REV. STAT. § 8-41-108(3) (Cum. Supp. 1979); IND. CODE ANN. § 22-3-7-10(b) (Burns 1974); KY. REV. STAT. § 342.620(2)(a) (1977); MO. ANN. STAT. § 287.067(1) (Vernon 1965); MONT. CODE ANN. § 39-72-408(3) (1979); NEV. REV. STAT. § 617.440(1)(d) (1977); N.M. STAT. ANN. § 52-3-32 (1978); TENN. CODE ANN. § 50-1101 (Cum. Supp. 1977); UTAH CODE ANN. § 35-2-26 (1974); VA. CODE § 65.1-46 (1973); W. VA. CODE § 23-4-1 (1978); cf. HAWAII REV. STAT. § 386-3 (1976) (disease must be "proximately caused by or resulting from the nature of the employment") (emphasis added); WASH. REV. CODE ANN. § 51.08.140 (1962) (disease must arise "naturally and proximately out of employment").


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It is significant that in defining compensable accident the workmen’s compensation law makes no mention of cause or causation as such. Impliedly, it thereby rejects or at least modifies the standard of proximate causation determinative in tort litigation. Therefore, care must be exercised lest long judicial habit in tort cases allows judicial thought in compensation cases to be too much influenced by a discarded or modified factor of decision.

It is apparent that the new standard “arising out of and in the course of” employment does not require that the latter be the proximate cause of injury. If the legislature had meant that it would have said so . . . . The phrase “out of” expresses a factor of source or contribution rather than cause in the sense of being proximate or direct. 227

Two years later, the Legislature put into the occupational disease definition precisely what the Hanson court noted was intentionally left out of the injury definition. 228 The Hanson court observed that if the Legislature had meant to include proximate cause, which the court clearly tied to tort law, the Legislature would have said so. The 1943 Legislature, presumably cognizant of this judicial interpretation, 229 phrased the new occupational disease definition in terms of proximate cause. Arguably, the Legislature would not have added to the already excessive verbiage of the occupational disease definition if its actual intent had been a non-tort form of proximate causation. Based upon this premise, the argument that the Legislature intended to incorporate tort principles of proximate cause in occupational disease is impressive. 230

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226. 209 Minn. 596, 297 N.W. 19 (1941) (upholding determination that employee’s injury by robbers arose out of employment involving night work in high-crime area).

227. Id. at 598-99, 297 N.W. at 21; see Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 9 N.W.2d 6 (1943). In Barlau, the court, upholding compensation for injury from employee falling because of an epileptic seizure, said:

The accident arose out of the employment if there was a causal connection between the employment and the injury. . . . By “causal connection” is meant not proximate cause as that term is used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his work.

Id. at 578, 9 N.W.2d at 13 (citations omitted).

228. See Act of Apr. 24, 1943, ch. 633, § 3, 1943 Minn. Laws 969, 970. This law was enacted 22 days after the decision in the Barlau case, discussed in note 227 supra.

229. See note 123 supra and accompanying text.

230. Compare the following from a Washington case:

The legislature is presumed to have been familiar with the meaning of “proximate cause” as used by the courts, and that being so, when they defined as an
Like courts in most other jurisdictions with occupational disease provisions requiring proximate cause, the Minnesota court has devoted very little attention to the proximate cause requirement. In the 1945 case of Hunter v. Zenith Dredge Co., reversing a denial of compensation for a shipyard worker’s disability from bursitis or synovitis caused by working with his knee on cold steel plates as he operated an air gun, the court noted, “Both medical experts testified that there was a direct causal connection between the disease and the employment.” In the 1946 case of Sandy v. Walter Butler Shipbuilders, Inc., holding as a matter of law that the occupational disease definition covered a machinist’s dermatitis from working in areas permeated with spun glass insulation dust, the court stated that “the glass dust was the ‘direct and proximate cause’ of his ailment.” In the 1957 Gray v. City of St. Paul case, upholding the definition’s application to a police officer’s contraction of tuberculosis from doing eight squad car shifts with a tuberculous fellow officer, the court observed, “Here the conditions of occupational disease those diseases or infections as arise naturally and proximately out of extrahazardous employment, it would follow that they meant that the condition of the extrahazardous employment must be the proximate cause of the disease for which claim for compensation is made, and that the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease, so that the disease would not have been contracted but for the condition existing in the extrahazardous employment.

the employment *proximately caused* Gray to become infected with tuberculosis and therefore his disease was under the circumstances and in fact a natural incident of his employment." The court also adopted the following three-part formulation:

The purpose and intent of the legislature must have been to liberalize the approach in consideration of occupational diseases intending to cover those (1) arising out of the employment, (2) where there is found to be a direct causal connection between the conditions under which the work is performed and the disease, and (3) that if the disease follows as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, it may be classed as an occupational disease.

Finally, in the 1963 *Schwartz v. City of Duluth* case, upholding a finding that the definition (and the presumption for certain diseases contracted by firefighters and peace officers) applied to a firefighter's coronary sclerosis, the court noted that the statute provides "that a disease arises out of employment only 'if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment.'"

After upholding the finding that the firefighter's coronary sclerosis was an occupational disease, the *Schwartz* court upheld compensation for his death from coronary thrombosis suffered while on a vacation from his fire department duties, saying:

The relators press the claim that the legal cause of death was

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237. *Id.* at 234, 84 N.W.2d at 615 (emphasis added).

238. *Id.* (emphasis added). This was substantially identical to the formulation suggested by the plaintiff in *Sandy*. See *Sandy v. Walter Butler Shipbuilders, Inc.*, 221 Minn. at 219-20, 21 N.W.2d at 615.

239. 264 Minn. 514, 119 N.W.2d 822 (1963).

240. The presumption, see notes 52-59 supra; notes 432-46 infra and accompanying text, applied because physical examinations indicated the firefighter did not have coronary sclerosis when he was hired. See 264 Minn. at 516 & n.2, 119 N.W.2d at 823-24 & n.2.

241. The court upheld the compensation court's crediting claimant's experts' testimony "that the extreme and hurried efforts involved in answering fire alarms, the climbing of ladders, the inhalation of fumes and smoke, the ever-present risks and uncertainties, and the lack of uninterrupted rest are all conditions conducive to development of" coronary sclerosis, rather than the employer's expert's testimony "that coronary sclerosis develops in people of all walks of life regardless of occupation and that it cannot be said that the particular hazards or conditions involved in the work of a fireman would give rise to that disability." *Id.* at 517, 119 N.W.2d at 824.

242. *Id.* at 517-18, 119 N.W.2d at 824.
the coronary thrombosis resulting from the exertion of hunting and that there is no causal connection between the coronary thrombosis and whatever disability he may have sustained by reason of his employment as a fireman. We have recognized that causal connection exists if the employment, by reason of its nature, obligations, or incidents, may reasonably be found to be the source of the injury-producing hazard. "By 'causal connection' is meant not proximate cause as that term is used in the law of negligence, but cause in the sense that the accident had its origin in the hazards to which the employment exposed the employee while doing his work. . . ."

In Nelson v. City of St. Paul, . . . we said: " . . . The causal connection of source is supplied if the employment exposes the employee to a hazard which originates on the premise as a part of the working environment, peculiarly exposes the employee to an external hazard whereby he is subjected to a different and a greater risk than if he had been pursuing his ordinary personal affairs. In other words, if the injury has its origin with a hazard or risk connected with the employment, and flows therefrom as a natural incident of the exposure occasioned by the nature of the work, it arises out of the employment."243

It might be argued that the language just quoted refers to the causation needed for occupational disease, in effect equating the proximate cause requirement with the increased-risk test used for "arising out of employment" under the personal injury definition.244 Reading it this way would respond to Professor Larson's point:

[P]roximate cause or legal cause is out of place in compensation law because, as developed in tort law, it is a concept that is itself thoroughly suffused with the idea of fault; that is, it is a theory of causation designed to bring about a just result when

243. Id. at 518-19, 119 N.W.2d at 825 (emphasis added) (citations omitted) (quoting Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d 272, 275 (1957)).
244. See notes 215-24 supra and accompanying text.

If the Schwartz language should be read as equating the occupational disease definition's proximate cause requirement with the extremely lenient "increased risk" approach, it might be urged that the Legislature adopted that approach by acquiescence. See note 123 supra and accompanying text. Although the Legislature amended the occupational disease provision three times since the February 8, 1963 Schwartz decision, it made no change in the causation language. See Act of June 7, 1979, ch. 3, § 29, 1979 Minn. Laws Ex. Sess. 1256, 1270 (extending presumption to forest officers of Department of Natural Resources; substituting "the" for "such" at two points in second sentence) (codified at MINN. STAT. § 176.011(15) (1978 & Supp. 1979)); Act of June 4, 1969, ch. 936, § 2, 1969 Minn. Laws 1804, 1805 (extending presumption to sheriffs and full-time deputy sheriffs); Act of May 6, 1963, ch. 497, § 1, 1963 Minn. Laws 730, 731 (extending presumption to members of game warden service and state crime bureau).
starting from an act containing some element of fault.245

But the language quoted from the Schwartz opinion actually seems to have been speaking of the causal connection between the disease and the death, rather than between the employment and the disease.246 Although the court did not refer to it, the act then included a provision providing compensation when "death is caused by a compensable occupational disease."247 The same result would follow under the statute defining "personal injury" to include "personal injury caused by occupational disease."248

It should be noted that the Schwartz arising-out-of-employment approach for death (or injury) caused by occupational disease is less demanding than the direct-and-natural-consequence approach usually applied to determine whether the employer is liable for subsequent nonemployment consequences of a previous compensa-

245. 1 A. Larson, supra note 18, § 6.60, at 3-8 (1978); see Riesenfeld, supra note 32, at 531 (since workers' compensation "is social insurance and not tort liability . . . none of the traditional restrictive tort doctrines such as . . . 'proximate causation' . . . should ever be relied upon in compensation cases"); cf. Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 549 (1962) (arguing that in tort cases the issue of causal relation between the actor's conduct and the harm should be resolved before the issue of whether the actor's conduct was wrongful).

246. The court did not refer to the occupational disease provision in this part of the opinion, or to that provision's exclusion of liability "for any occupational disease which cannot be traced to the employment as a direct and proximate cause" anywhere in the opinion. Neither Barlau nor Nelson, nor any of the other cases cited in this part of the opinion, see Anderson v. Armour & Co., 257 Minn. 281, 101 N.W.2d 435 (1960); Rosvold v. Independent Consol. School Dist. No. 102, 251 Minn. 297, 87 N.W.2d 646 (1958); Niess v. Superior Packing Co., 249 Minn. 297, 81 N.W.2d 773 (1957); Golob v. Buckingham Hotel, 244 Minn. 301, 69 N.W.2d 636 (1955), involved the occupational disease provision.


If an employee is disabled or dies and his disability or death is caused by a compensable occupational disease, he or his dependents are entitled to compensation for his death or for the duration of his disability according to the provisions of this act, except as otherwise provided in this act.


This would apply to death caused by occupational disease because the Minnesota court has implicitly held death to be a "personal injury." See, e.g., Epp v. Midwestern Mach. Co., 296 Minn. 231, 208 N.W.2d 87 (1973) (per curiam). Notwithstanding the fact that Minn. Stat. § 176.021(1) (1978) refers to personal injury and death separately in imposing compensation liability for "personal injury or death . . . arising out of and in the course of employment," the court has subjected claims for death from employment to the provision regarding the definition of personal injury that appears only in Minn. Stat. § 176.011(16), that the employee is not covered "except while engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service." See Bronson v. Joyner's Silver & Electroplating, Inc., 268 Minn. 1, 4, 127 N.W.2d 678, 680 (1964); Kelley v. Northwest Paper Co., 190 Minn. 291, 292, 251 N.W. 274, 274 (1933).
ble injury.249

Assuming the occupational disease definition's requirement of proximate causation means something beyond the increased-risk test used for arising-out-of-employment under personal injury, it may be useful to consider the various respects in which the proximate cause requirement used in common-law negligence cases250 may be more demanding than the increased-risk test, and whether each aspect of common-law negligence proximate cause should apply to the compensation law's occupational disease definition.

a. Foreseeability

Professor Larson asserts that "arising out of” should not be construed to require proximate causation because, inter alia, the latter "would demand that the harms be foreseeable as a hazard of this kind of employment."251 Although some states' negligence cases

249. See Hendrickson v. George Madsen Constr. Co., 281 N.W.2d 672, 675 (Minn. 1979) (reversing award for death from heart attack caused by stress of compensation hearing regarding compensable shoulder injury); Wallace v. Judd Brown Constr. Co., 269 Minn. 455, 459, 131 N.W.2d 540, 544 (1964) (reversing award for fracturing femur in non-employment fall when evidence showed fracture was more likely because knee had been immobilized in treating previous work injury) (questionable result); Eide v. Whirlpool Seeger Corp., 260 Minn. 98, 102, 109 N.W.2d 47, 50 (1961) (upholding award for aggravation of compensable back injury caused by effect on posture from leg cast required to treat leg injury sustained while playing badminton subsequent to compensable back injury). See generally 1 A. LARSON, supra note 18, §§ 13.00-23 (1978).


251. 1 A. LARSON, supra note 18, § 6.60, at 3-6 (1978). Professor Larson develops his point as follows:

[What relevance has foreseeability if one is not interested in the culpability of the actor's conduct? There is nothing in the theory of compensation liability that cares whether the employer foresaw particular kinds of harm or not. The only criterion is connection in fact with the employment, whether it is foreseeable in advance, or apparent only in retrospect. This criterion cannot in any logical sense be made to depend on foreseeability. For example, suppose that a wheel flew off a high speed machine, and splashed molten metal from a vat onto the controls of a sprinkler system, which, in turn, set off the sprinklers, which wet a hot light bulb, which exploded just as claimant was yawning, with the result that claimant swallowed a piece of glass. Any such set of improbabilities, of the sort familiar to first-semester tort students, would at an early stage pass out of the bounds of foreseeability, if the work has any connection with reality at all. And yet, if claimant was working at his job, there can be no doubt that he is entitled to compensation, for the injury was clearly connected with his work, although the causal sequence was unforeseeable.

Id. at 3-8 to -9.
require foreseeability of the resultant harm,252 Minnesota, in accord with the Restatement (Second) of Torts,253 does not.254 Similarly, in 1943 when the Legislature adopted the occupational disease definition, Minnesota did not deem proximate causation to require foreseeability of the extent of the harm or the manner in which it occurred.255 Accordingly, the definition's proximate cause requirement cannot be taken to demand such foreseeability.256

b. Extraordinary Harm

According to the Restatement (Second) of Torts, "The actor's conduct may be held not to be a legal cause of harm to another where

252. See W. Prosser, supra note 250, at 251. See generally H. Hart & A. Honore, supra note 250, at 231-60.

253. Restatement (Second) of Torts § 435(1) (1965) provides: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable."

254. See Schulz v. Feigal, 273 Minn. 470, 476, 142 N.W.2d 84, 89 (1966) (not necessary that defendant "could have anticipated the particular injury which did happen"); Dellwo v. Pearson, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961) ("trial court erred in making foreseeability a test of proximate cause" because "negligence is tested by foresight but proximate cause is determined by hindsight").

255. See Thomsen v. Reibel, 212 Minn. 83, 86, 2 N.W.2d 567, 569 (1942) (defendant may be liable "although he could not have anticipated the particular injury which did happen"); Keegan v. Minneapolis & St. L.R.R., 76 Minn. 90, 91, 78 N.W. 965, 965 (1899) (negligent wrongdoer "responsible, even though he could not have foreseen the particular results which did in fact follow"); Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 97, 69 N.W. 640, 641 (1896) (negligent defendant "liable for all [of act's] natural and probable consequences, whether he could have foreseen them or not").

Strangely enough, the court has referred to foreseeability in a non-disease compensation case. In Weidenbach v. Miller, 237 Minn. 278, 291, 55 N.W.2d 289, 296 (1952), the court, in upholding a denial of benefits for a truck driver's death from trying to rescue a person who had fallen through ice in a lake, reasoned that it could not "have been contemplated by reasonable persons that [the rescue attempt] as an incident to the employment in which he was engaged." This was apparently directed to the "in the course of" rather than the "arising out of" requirement; the opinion's next sentence referred to "scope of the employment," and the court earlier in the opinion quoted with approval Horovitz, The Litigious Phrase: "Arising out of" Employment, 3 NACCA L.J. 15, 39 (1960), stating, inter alia, that "it is not necessary that the injury be one which ought to have been foreseen or expected" and "[t]he risk insured is not only the foreseeable one." Id. at 282, 55 N.W.2d at 291.

Foreseeability does not seem to be an appropriate concept for either "arising out of" or "in the course of" analysis.

256. The occupational disease provisions of thirteen states—Arizona, Illinois, Indiana, Iowa, Kentucky, Missouri, Nevada, New Mexico, North Dakota, Tennessee, Utah, Virginia, and West Virginia—specify that the disease need not "have been foreseen or expected," and all of those except Tennessee, Virginia, and West Virginia further specify that the disease's employment connection need appear only "after its contraction." See note 223 supra.
after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.\textsuperscript{257} Although the Minnesota court has not specifically called for exemption of "highly extraordinary" results, it has indicated that liability extends only to the "natural and probable consequences" of negligence.\textsuperscript{258}

The Minnesota court generally has not excluded "personal injury" compensation because it was highly extraordinary for the employment to have brought about the injury.\textsuperscript{259} The closest it has come has been to hold, like other jurisdictions,\textsuperscript{260} that seeking personal comfort is not covered if the method chosen is highly unusual or unreasonable.\textsuperscript{261}

As indicated in the discussion of the definition's requirement for the disease to be a "recognized" hazard,\textsuperscript{262} Minnesota cases have allowed occupational disease compensation when it was fairly extraordinary for the employment to have brought about the disease. In one case,\textsuperscript{263} it will be recalled, the compensation court granted compensation for ischemic neuritis sustained by an employee working in cold water during a flood although the sole medical expert "testified that during his forty years of practice he had

\begin{footnotes}
\footnotetext{257.}{\textit{Restatement (Second) of Torts} § 435(2) (1965).}
\footnotetext{258.}{See Aldes v. St. Paul Ball Club, Inc., 251 Minn. 440, 442, 88 N.W.2d 94, 96 (1958).}
\footnotetext{259.}{The Minnesota court has embraced the "hindsight" approach of \textit{Restatement (Second) of Torts} § 435(2) (1965). See Okrina v. Midwestern Corp., 282 Minn. 400, 405, 165 N.W.2d 259, 263 (1969) ("negligence is tested by foresight but proximate cause is determined by hindsight"); Dellwo v. Pearson, 259 Minn. 452, 456, 107 N.W.2d 859, 862 (1961).}
\footnotetext{260.}{See, e.g., Beach v. American Steel & Wire Div., 248 Minn. 11, 17, 78 N.W.2d 371, 376 (1956) (upholding compensation for chemist's death from poison chemist may have "taken for the purpose of relieving a distressed feeling in the belief that it was something else"); Wold v. Chevrolet Motor Co., 147 Minn. 17, 179 N.W. 219 (1920) (upholding compensation for employee auto passenger's death from bullet fired by peace officer trying to hit tires of the auto mistakenly thought to be stolen).}
\footnotetext{261.}{See 1A A. Larson, \textit{supra} note 18, § 21.81 (1979).}
\footnotetext{262.}{See Kerpen v. Bill Boyer Ford, Inc., 305 Minn. 47, 232 N.W.2d 21 (1975) (per curiam) (upholding denial to employee injured by coemployee's "amateur chiropractic" massage of his back); Elfelt v. Red Owl Stores, 296 Minn. 41, 206 N.W.2d 370 (1973) (upholding denial to employee who while leaving for supper jumped to touch rafter and caught finger between bolts, resulting in loss of finger) (questionable result). But the \textit{Weidenbach} court's quotation from the Horovitz Article, see note 255 \textit{supra}, included the statement that "[e]ven unusual or extraordinary consequences of the employment may well be compensable." 237 Minn. at 282, 55 N.W.2d at 291.}
\footnotetext{263.}{Sinclair v. Frye, 18 Minn. Workmen's Comp. Dec. 93 (1954).}
\end{footnotes}
never come across a case like [this]."264 Thus, under the Minnesota occupational disease provision, the extraordinary harm factor probably will not prevent finding the employment to have proximately caused the disease.

c. Substantial Factor

Restatement (Second) of Torts section 431(a) requires the negligent conduct to be "a substantial factor in bringing about the harm."265 Comment a proceeds to explain:

The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.266

Section 433 goes on to provide:

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) elapse of time.267

The Minnesota court has adhered to the substantial-factor approach in a number of negligence cases.268

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264. Id. at 96.

265. Restatement (Second) of Torts § 431(a) (1965).

266. Id., Comment a. Comment b's discussion distinguishes "substantial" from "merely negligible" or "negligible." See id., Comment b.

267. Id. § 433.

268. See, e.g., DeCourcy v. Trustees of Westminster Presbyterian Church, 270 Minn. 560, 563, 134 N.W.2d 326, 328 (1965); Johnson v. Evanski, 221 Minn. 323, 328, 22 N.W.2d 213, 216 (1946); Smith v. Carlson, 209 Minn. 268, 272, 296 N.W. 132, 134 (1941); Peterson
With respect to workers' compensation, the Minnesota court has not spoken of a general substantial-factor requirement for arising-out-of issues in the personal injury context. But it has stated that work activity must be a “substantial contributing cause” of a heart attack in order to produce compensability. In *Klapperich v. Agape Halfway House, Inc.*, the court observed:

[T]he establishment of medical causation from a work-related activity does not in and of itself establish legal causation for purposes of awarding workers' compensation benefits. This is so because such medical causation might be so insignificant or happenstance that the work-related activity cannot be said to be a substantial contributing cause of the heart attack.

This language should be taken to refer only to cases involving aggravation of a nonwork condition, rather than to indicate a general substantial-factor requirement for arising-out-of issues. In a law review article cited by the *Klapperich* court, Professor Larson would impose the substantial-factor requirement only in aggravation of nonwork condition situations:

> [W]hen the employee contributes some personal element of risk—e.g., by having a personal enemy who assaults him, or a personal disease which figures causally in his injury—the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the

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v. Fulton, 192 Minn. 360, 364, 256 N.W. 901, 903 (1934). *See also 4 MINNESOTA PRACTICE JIG II, 140 G-S (2d ed. 1974).*

269. It has, however, in a case controlled by the increased-risk test, said that the employment “must be more than the occasion” for the injury. *See Sivald v. Ford Motor Co., 188 Minn. 463, 472, 247 N.W. 687, 691 (1933) (reversing award for death from assault); cf. Sieger v. Knox & Peterson, 160 Minn. 185, 189, 199 N.W. 573, 574 (1924) (reversing denial when the employment was “much more than the mere occasion for the assault”). As stated in the text accompanying notes 279-80 *infra*, the increased-risk test would seem to satisfy any substantial-factor requirement.

270. 281 N.W.2d 675 (Minn. 1979).

271. After concluding that an award for a heart attack allegedly caused by employment stress could not stand because both sides' experts testified that only significant or unusual mental stress would cause the infarction and the evidence did not support a finding that the employee was exposed to significant or unusual mental stress, the court stated, “Having disposed of the case, we need not consider whether the test of legal causation was satisfied.” *Id.* at 680.

272. *Id.* (dictum). The court added, “See, also *Kleman v. Ford Motor Co.*, 307 Minn. 218, 239 N.W.2d 449 (1976).” It is not clear why the court cited *Kleman*, a 5-4 affirmation of an award for a death from a heart attack. Perhaps it was because the doctors' testimony in that case was in terms of whether the employment was “a substantial causal factor in employee's death,” *Kleman v. Ford Motor Co.*, 307 Minn. 218, 221, 239 N.W.2d 449, 451 (1976), or “a significant substantial cause of his death.” *Id.* at 226, 239 N.W.2d at 453 (Peterson, J., dissenting).
causal contribution of the personal risk.273

The Minnesota court has not directly addressed the application of the substantial-factor approach to occupational disease recovery but in *Scott v. Southview Chevrolet Co.*,274 upholding occupational disease compensation for pulmonary emphysema suffered by an auto dealer's car starter, the court noted that a medical expert "opined that the characteristics of Scott's employment 'had quite a bit to do with his lung disease,' and were a substantial causative factor."275 Moreover, after quoting from the occupational disease definition, italicizing the words "[a] disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident" and "[a]n employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause,"276 the court reiterated that the medical expert "was of the opinion that there was a substantial relationship between Scott's illness and the conditions of his employment."277 The court further observed:

Judge Walsh asked the doctor point blank whether he believed Scott's exposure to exhaust fumes to have been a substantial factor in causing Scott's lung problem. The doctor stated that exhaust was one of several important concurrent factors, but he declined to specify the contributing role of exhaust fumes in terms of a percentage.278

The increased-risk test279 would seem to satisfy any substantial-


As to situations which do not involve any personal risk element, the better rule goes beyond the old rule, which demanded that the employment contribute an increased or peculiar risk, and accepts actual risk, or even positional risk. The reason is that there is no competing personal risk to overcome. Any employment contribution, even merely putting the employee in the place where the injury from a neutral force occurred, is enough, because it is greater than the zero employee contribution.

Larson, supra, at 469.

274. 267 N.W.2d 185 (Minn. 1978).
275. *Id.* at 187 (footnote omitted).
276. *Id.* at 187-88.
277. *Id.* at 188.
278. *Id.*
279. See notes 215-17 supra and accompanying text.
factor requirement.\textsuperscript{280} If something about the employment increased the employee's risk of harm beyond that of the public generally or the employee apart from work, the employment would be a substantial factor bringing about the harm. Since increased risk is the only arising-out-of test appropriate for disease situations,\textsuperscript{281} a substantial-factor requirement would not add anything beyond what is already required by the arising-out-of test.

d. Emotional Disturbance

i. Negligence Cases

Section 436A of the Restatement (Second) of Torts precludes liability for negligence (as opposed to intentional or reckless conduct\textsuperscript{282}) that results in "emotional disturbance alone, without bodily harm or other compensable damage."\textsuperscript{283} The Comment explains the three reasons usually given by the courts for this rule:

One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles. It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants. The second is that in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do

\textsuperscript{280} See Professor Larson's discussion in note 273 supra and accompanying text.

\textsuperscript{281} See note 176 supra and accompanying text.

\textsuperscript{282} See Restatement (Second) of Torts §§ 46-47 (1965).

\textsuperscript{283} Restatement (Second) of Torts § 436A (1965) states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Section 456 provides for liability for emotional disturbance resulting from negligently caused physical harm. Section 436 provides for liability for physical harm resulting from negligently caused emotional disturbance. Compare Okrina v. Midwestern Corp., 282 Minn. 400, 165 N.W.2d 259 (1969) (illness requiring five-day hospitalization, pains, and personality change) and Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892) (miscarriage and subsequent illness) with Stadler v. Cross, 295 N.W.2d 552, 553 (Minn. 1980) (Okrina and Purcell apply only when plaintiff was within zone of danger of physical injury and reasonably feared for own safety).
harm, his fault is not so great that he should be required to
make good a purely mental disturbance.\textsuperscript{284}

Minnesota's common law is in accord with section 436A in bar-
ring liability for negligence that results solely in emotional dis-
turbance, unaccompanied by any bodily harm or other com-
peniable damage.

In an 1894 case, the court overturned a verdict for mental
anguish resulting from defendant telegraph company's failure to
transmit a message from plaintiff's wife regarding her willingness
to reconcile.\textsuperscript{285} An 1885 statute provided for liability for failure to
transmit or deliver telegraph messages.\textsuperscript{286} Although plaintiff al-
leged that the defendant's failure was negligent,\textsuperscript{287} the court said:

This action is not one of tort, but on contract; its gist and
gravamen being the breach of the contract, the duties and obli-
gations growing out of which are regulated by the statute,
which itself becomes a part of it . . . .

We are therefore left to determine the question here
presented according to the rules of the common law applicable
to actions for damages for breach of contract. In such actions,
can damages be recovered for mental suffering resulting from a
breach of the contract?\textsuperscript{288}

The court answered this question in the negative, primarily be-
cause "such damages are more sentimental than substantial."\textsuperscript{289}

In a 1907 case, the court held that a plaintiff could not recover
damages for mental pain and anguish caused by defendant rail-
road's misrouting of plaintiff's child's corpse.\textsuperscript{290} Finding that the
complaint charged "at most, a negligent failure to perform the
contract," the court ruled that the case was governed by the just-
mentioned telegram case.\textsuperscript{291}

In 1963 the court reversed a wife's dram shop recovery for
mental anguish over her husband's injuries.\textsuperscript{292} The court held that
this was not injury to her person within the meaning of the dram

\textsuperscript{284.} Restatement (Second) of Torts § 436A, Comment b (1965).
\textsuperscript{285.} Francis v. Western Union Tel. Co., 58 Minn. 252, 59 N.W. 1078 (1894).
\textsuperscript{286.} See Act of Mar. 7, 1885, ch. 208, 1885 Minn. Gen. Laws 278 (current version at
MINN. STAT. § 609.775 (1978)).
\textsuperscript{287.} Id. at 258, 59 N.W. at 1078.
\textsuperscript{288.} Id. at 261, 59 N.W. at 1080.
\textsuperscript{289.} Id.
\textsuperscript{290.} Beaulieu v. Great N. Ry., 103 Minn. 47, 114 N.W. 353 (1907).
\textsuperscript{291.} Id. at 55, 114 N.W. at 356.
\textsuperscript{292.} State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36
(1963) (court upheld wife's loss of "means of support" recovery).
shop statute. 293

In 1979 the court struck down an insured's recovery for emotional distress from defendant insurer's wrongful refusal to pay no-fault benefits with knowledge that the nonpayment would cause severe financial hardship. 294

Finally, in 1980, the court upheld a summary judgment against parents seeking recovery for emotional distress from witnessing an accident in which defendants' truck struck their young son. 295 The court held that even when the emotional distress produced physical symptoms, recovery was barred inasmuch as plaintiffs were not within the zone of danger of physical impact and reasonably fearful for their own safety. 296

Thus, the Minnesota court has refused to join those jurisdictions that grant recovery for negligent conduct resulting in emotional disturbance unaccompanied by physical harm. 297

ii. Personal Injury Compensation Cases

A majority of jurisdictions that have considered the issue grant workers' compensation to victims of "personal injury" for work-related emotional disturbance unaccompanied by physical harm. 298 According to Samuel Horovitz, "Grasping at the common-law ruling that nervous shock without a flesh wound or external trauma was not a basis of liability, insurance carriers fought to infuse the same doctrine into compensation acts. Successful in a few states, they went down to defeat in England and in most

293. Id. at 367, 122 N.W.2d at 41; cf. Okrina v. Midwestern Corp., 282 Minn. 400, 404, 165 N.W.2d 259, 262 (1969) (physical injury sustained as a result of fear).
295. Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980).
296. Id. at 553.
American jurisdictions."

Although the Minnesota Supreme Court has upheld personal injury compensation when a physical work injury produced emotional effects, and when emotional stress at work produced physical effects, it has not yet confronted the issue of personal injury compensability when emotional stress at work produces only emotional effects.

S. Horovitz, supra note 28, at 75 (emphasis in original) (footnote omitted). Horovitz goes on to say, "A worker who has a nervous collapse, without physical impact, after helping carry a fellow worker who was crushed by a timber prop and bleeding from the ears and head, and thereupon needs medical care himself and loses substantial time from work, receives a compensable 'personal injury.' " Id. (emphasis in original) (footnote citing Yates v. South Kirkby, &c. Collieries, Ltd., [1910] 2 K.B. 538.

See Hartman v. Cold Spring Granite Co., 243 Minn. 264, 67 N.W.2d 656 (1954) (traumatic neurosis—described by an intern as "compensation neurosis")—from physical work injuries made employee impotent and walk with a limp and produced total disability); Rystedt v. Minneapolis-Moline Power Implement Co., 186 Minn. 185, 242 N.W. 623 (1932) ("hysterical paralysis" from physical strain at work made employee, not organically disabled, unable to use an arm); Welchlin v. Fairmont Ry. Motors, 180 Minn. 411, 230 N.W. 897 (1930) (traumatic neurosis from physical work injury made employee limp and produced temporary partial disability); cf. Mitchell v. White Castle Sys., Inc., 290 N.W.2d 753 (Minn. 1980) (traumatic neurosis from being struck by customer); Dahler v. DeZurik Corp., No. 477-40-7106 (Minn. Workers' Comp. Ct. App. Jan. 11, 1979) (compensation for disability caused solely by depression and neurosis from a work-related heart attack). Regarding traumatic neurosis generally, see 1B A. Larson, supra note 18, § 42.22; Blinder, The Defense of Claims of Psychic Trauma and Psychiatric Disability, 12 Forum 934 (1977). Regarding physical work injury producing emotional effects in general, see 1B A. Larson, supra note 18, § 42.22.

See Aker v. State, 282 N.W.2d 533 (Minn. 1979) (emotional stress from handling badly decomposed bodies and transporting them considerable distance by canoe produced heart attack); Anderson v. Armour & Co., 257 Minn. 281, 101 N.W.2d 435 (1960) (worry about truck accident that injured pedestrian caused psychotic depressive reaction resulting in suicide); Clark v. Bituminous Roadways, Inc., 33 Minn. Workers' Comp. Dec. 1 (1980) (extremely sensitive employee's being told he would have to work with company president with "volcanic type personality" who had subjected employee to abuse on previous occasions was substantial contributing cause of heart attack); Mack v. Pilgrim Lutheran Church, 32 Minn. Workers' Comp. Dec. 534 (1980) (stress from schism within church was substantial contributing cause of pastor's fatal heart attack); cf. Cooley v. Construction Laborers Local Union No. 405, 25 Minn. Workmen's Comp. Dec. 12 (1969), aff'd per curiam, 287 Minn. 559, 178 N.W.2d 697 (1970), in which compensation was denied on the apparent ground that the depression resulting in suicide was not from worry about the job, but rather caused by a nonwork-related heart attack, possible job loss, and charges of defalcation. Query whether this distinction is sound. The employee in Anderson had expressed concern not only about the possibility of losing his job because of the truck accident but also about the possibility of the accident victim dying. Anderson v. Armour & Co., 257 Minn. at 283, 101 N.W.2d at 437 (1960); cf. Olson v. F.I. Crane Lumber Co., 259 Minn. 248, 107 N.W.2d 223 (1960) (compensation for suicide resulting from depression about work-related heart attack).

For a general discussion of work-related emotional stress producing physical effects, see 1B A. Larson, supra note 18, § 42.21.
The compensation court has done so, however, and has awarded personal injury compensation. In the 1976 case of Connoy v. Hennepin County General Hospital, the compensation court awarded medical and disability benefits to an employee who suffered a nervous breakdown following a performance review at work, saying:

[W]e . . . conclude that there was a significant and substantial change in employee's mental and emotional condition as of July 29, 1974 and immediately thereafter to constitute a personal injury, and that said change was causally related to and precipitated by presentation to and discussion of employee's performance report on July 29, 1974 . . . .

With respect to . . . employee's hospitalization of November 5, 1974 and need for medical treatment and care thereafter, we also conclude on the evidence that this was occasioned by a depressive reaction which was a sequela of and attributable to her emotional condition precipitated by the employment performance report and review of July 29, 1974 . . . .

[T]he compensation act does not apply to those only who are strong in body. Neither is it limited to those who are normal. Those who are below normal, have a weakness or disease, are also within its protection.

It appears from the record that the performance report and review thereof was a substantial contributing factor to employee's nervous breakdown and the precipitating factor of it. It need not be the sole cause.

The supreme court should follow the compensation court's lead when presented with the opportunity and find a personal injury to be compensable when emotional stress at work produces only emotional effects. The reasons for the common law's failure to impose liability for negligence resulting only in emotional disturbance have little, if any, application to this workers' compensation issue:

(1) The concern about burdening the system with too-trivial cases is rendered inapplicable by the compensation act's covering only cases in which there is medical treatment reasonably required, disability persisting more than three days, or

303. Id., slip op. at 2 (citations omitted). Compare id. with McKinzie v. Dayton-Hudson Corp., 32 Minn. Workers' Comp. Dec. 559 (1980) (anxiety neurosis was caused by personal problems; alleged work stress was not a significant contributing factor).
304. See notes 285-96 supra and accompanying text.
306. See id. § 176.121 (1978).
death. 307

(2) The concern about spurious claims "in the absence of the guarantee of genuineness provided by resulting bodily harm," 308 entitled to little weight in any event, 309 is largely ameliorated by the fact that reasonably required medical treatment, disability exceeding three days, and death are "guarantees of genuineness," as well as the fact that compensation is not given for pain and suffering.

(3) The contention that negligence, as opposed to intent to do harm, is not so great a fault as to require making good a purely mental disturbance has no relevance in a system that compensates harm not because it was caused by culpable conduct, 310 but because it arose out of and in the course of employment 311 and should be considered a cost of industry to be passed on to those who enjoy industry's benefits. 312

307. See id. § 176.111 (1978 & Supp. 1979); cf. id. § 65B.43(7) (1978) (no-fault act) (defines "loss" as not including noneconomic detriment but as including economic detriment caused by pain and suffering or physical or mental impairment).

308. RESTATEMENT (SECOND) OF TORTS § 436A, Comment b (1965), quoted in text accompanying note 284 supra.

309. The Minnesota court has generally not seen fear of spurious claims as a sufficient reason to deny a remedy for harm. See Beaudette v. Fraza, 285 Minn. 366, 372, 173 N.W.2d 416, 419 (1969) (abolishing interspousal immunity for tort actions although "[c]ollusion in making spurious claims is an undeniable temptation where a member of the family is insured"); Silesky v. Kelman, 281 Minn. 431, 441, 161 N.W.2d 631, 637 (1968) (abolishing parental immunity in negligence actions with certain exceptions) ("the fraud-collusion-perjury argument . . . does not warrant denial of a remedy to the child"), overruled in part, Anderson v. Stream, No. 49520 (Minn. July 3, 1980) (abolishing exceptions and adopting "reasonable parent" standard); Balts v. Balts, 273 Minn. 419, 431, 142 N.W.2d 66, 73 (1966) (abolishing parent-child tort immunity) ("the judicial system is adequate to accomodate itself to threats of collusion and . . . the injustice of continued immunity outweighs the danger of fraud"); cf. 1B A. LARSON, supra note 18, § 42.24, at 7-654, speaking to the concern about distinguishing those suffering traumatic neurosis from malingerers: "In the last analysis, the problem of malingering is one of fact, which must be left to the skill and experience of medical and psychiatric experts, and of compensation administrators, who usually manage in time to develop considerable facility in detecting malingerers at the fact-finding level."

310. See MINN. STAT. § 176.021(1) (1978), specifying the employer's liability for compensation "in every case of personal injury or death of his employee arising out of and in the course of employment without regard to the question of negligence, unless the injury was intentionally self-inflicted or when the intoxication of the employee is the proximate cause of the injury."

311. See id.

312. See note 245 supra and accompanying text; cf. 53 CHI.-KENT L. REV. 731, 736-37 (1977), noting that courts that "applied the tort rule of physical impact to compensation cases involving mental injury . . . disregarded the fact that the procedures and criteria utilized in granting a workmen's compensation award are vastly different from the processes implemented in negligence cases for determining liability and damages." In Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637

http://open.mitchellhamline.edu/wmlr/vol6/iss3/3
Moreover, as pointed out by Professor Larson:

[T]here is no really valid distinction between physical and “nervous” injury. Certainly modern medical opinion would support this view, and insist that it is no longer realistic to draw a line between what is “nervous” and what is “physical.” It is an old story, in the history of law, to observe legal theory constantly adapting itself to accommodate new advances and knowledge in medical theory. Perhaps, in earlier years, when much less was known about mental and nervous injuries and their relation to “physical” symptoms and behavior, there was an excuse, on grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and in workmen’s compensation. But the excuse no longer exists. 313

It would be inconsistent to allow compensation when emotional stress at work produces physical effects but deny it when similar emotional stress produces only emotional effects. 314 For example, in the 1960 case of Anderson v. Armour & Co., 315 the court upheld death benefits when a truck driver’s worry about having hit a pedestrian caused a psychotic depressive reaction resulting in suicide. The court hardly could have denied medical and disability benefits if the truck driver had been able to curb his “uncontrollable impulse” 316 toward suicide and required hospitalization for his mental disorder. Similarly, in Aker v. State, 317 the court upheld

(1975), upholding compensation to an employee who had to be hospitalized for acute depressive reaction caused by the discovery of her supervisor’s body lying in a pool of blood after he had committed suicide, the court said, “Workmen’s compensation, as distinguished from tort liability which is essentially based on fault, is designed to shift the risk of loss of earning capacity caused by industrial accidents from the worker to industry and ultimately the consumer.” Id. at 508, 330 N.E.2d at 605, 369 N.Y.S.2d at 640.

313. 1B A. LARSON, supra note 18, § 42.23(a), at 7-632; see id. at 7-636 (quoting Indemnity Ins. Co. v. Loftis, 103 Ga. App. 749, 751, 120 S.E.2d 655, 656 (1961)), which states:

The human body consists of bones, flesh, ligaments, and nerves, controlled by the brain. The law does not state which of these particular elements must produce the disability. If a disability exists, whether or not it is psychic or mental, if it is real and is brought on by the accident and injury, this being a humane law and liberally construed, it is nevertheless compensable.

Id., cf. 53 CHI.-KENT L. REV. 731, 738 n.38 (1977) (psychiatric techniques have advanced to point where it can be determined with reasonable amount of certainty whether or not mental distress is in fact real).


315. 257 Minn. 281, 101 N.W.2d 435 (1960).

316. In response to the employer’s claim that the employee intended to kill himself, see generally MINN. STAT. § 176.021(1) (1978) (excluding “intentionally self-inflicted” injuries), the court upheld the compensation court’s finding based on psychiatric testimony that the employee “had an uncontrollable impulse to end his life.” 257 Minn. at 288-89, 101 N.W.2d at 439-40.

317. 282 N.W.2d 533 (Minn. 1979).
death benefits when a Department of Natural Resources employee’s emotional stress from handling badly decomposed bodies and transporting them some miles by canoe produced a heart attack that, in turn, caused a fatal second heart attack two weeks later.\footnote{318} It is hard to believe that the court would have denied medical and disability benefits if the “ordeal”\footnote{319} of handling and transporting the bodies had resulted in a nervous breakdown instead of a heart attack. Accordingly, New York’s highest court has aptly observed:

\textit{[A]s noted in the psychiatric testimony there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same—the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen’s Compensation Law.}\footnote{320}

\textit{iii. Occupational Disease Compensation Cases}

A 1977 Georgia case\footnote{321} held that Georgia’s occupational disease provision (requiring, \textit{inter alia}, a “direct causal connection between the conditions under which the work is performed and the disease”\footnote{322}) could apply\footnote{323} to a young man who, employed for two years as a counselor at an institution for boys with social and be-

\footnote{318. The court noted: \textit{Even though employee’s second and fatal myocardial infarction of August 28, 1976, occurred when he was at home, if it was established that the first myocardial infarction was work related, the requisite causation was established because the second infarction occurred in the vicinity of the first infarction and the first infarction would have weakened employee’s heart.}} \textit{Id. at 535 n.2.}

\footnote{319. The widow used the term “ordeal” to describe the employee’s description to her of removing the bodies, and the employee had told a supervisor that it was “the damndest thing he ever had to do in his years as an Officer.” \textit{Id. at 535.}}


\footnote{322. \textit{See GA. CODE ANN. § 114-803 (1973) (emphasis added).} The statute provides in relevant part: \textit{Whenever used in this Chapter, the term “occupational disease” shall include only those diseases hereinafter listed in this section and shall be construed to mean only such listed disease which is due to causes and conditions which are characteristic of and peculiar to the particular trade, occupation, process, or em-
havioral problems, developed paranoid schizophrenia because of "deep preoccupations in the areas of religion (the institution had, according to the psychiatric expert witness, a pronounced religious orientation which affected the claimant) and homosexuality (relating to his interpretation of his feelings toward the younger boys in his charge)." His condition required hospitalization, electroshock, and psychiatric treatment. After upholding a ruling that this was not an injury by "accident" because the evidence did not "delineate particularized traumatic occurrences," the court said:

There is, however, another valid approach to the problem in this case. The evidence is undisputed that the claimant suffered from an acute psychotic attack diagnosed as paranoid schizophrenia, a mental illness characterized by loss of perception of reality, which may be, and in the opinion of the psychiatrist was, initiated by the job influences to which the claimant was exposed. This is, according to the expert testimony "a disease process."

The evidence here strongly suggests that a disease (acute psychotic character disorder diagnosed paranoid schizophrenia) employment in which the employee is exposed to such disease (excluding all ordinary diseases of life to which the general public are exposed), to wit:

5. Other occupational diseases providing the employee or the employee's dependents first prove to the satisfaction of the State Board of Workmen's Compensation (or the Medical Board if the matter in controversy is referred to it under the provisions of section 114-819) all of the following:
   (a) A direct causal connection between the conditions under which the work is performed and the disease;
   (b) That the disease followed as a natural incident of exposure by reason of the employment;
   (c) That the disease is not a character to which the employee may have had substantial exposure outside of the employment;
   (d) That the disease is not an ordinary disease of life to which the general public is exposed;
   (e) That the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.

Id. The court held that the matter should be referred to the Medical Board to determine whether it did apply. See note 328 infra.

323. The court held that the matter should be referred to the Medical Board to determine whether it did apply. See note 328 infra.
325. Id. at 299, 233 S.E.2d at 229.
326. Id. at 301, 233 S.E.2d at 230, cf. Ga. Code Ann. § 114-102 (1973) ("‘Injury’ and ‘personal injury’ shall mean only injury by accident . . . "). Regarding Minnesota's pre-1953 "accident" requirement, see notes 34-41 supra and accompanying text.
nia) resulted from pressures of the claimant's job environment (close long term association with and responsibility for a group of disturbed men) resulting in a disability to himself.328

Courts in two other jurisdictions have held open the question whether emotional effects of emotional stress at work may be compensated under occupational disease provisions.329 The statutes in these jurisdictions, however, do not specify that there must be "direct" or "proximate" causation.330

The Minnesota occupational disease provision's proximate cause requirement should not prevent occupational disease coverage when emotional stress at work produces emotional effects. As

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328. Id. at 301, 303, 233 S.E.2d at 230, 231 (1977). The Sawyer court continued:
   This is a medical question which should properly be referred to the Medical Board for investigation under the provisions of Code § 114-819. That board would have for decision whether such diagnosis is correct, whether it was job-related, and whether the conditions of Code § 114-803(5) have been met. 

Id. at 303, 233 S.E.2d at 231. The court denied a motion for rehearing, saying:
   Movant urges that since it is admitted that this employee suffers from schizophrenia there is no medical question in controversy. He then states, "The issue was causality, and that, if we must remind the Court, is a question of fact!" We agree with this statement as it is not controverted that the defendant now suffers from this disease but whether or not such disease resulted from his employment is a medical question and it is the crux of this lawsuit. 

Id. at 303, 233 S.E.2d at 231-32.

Regarding Minnesota's short-lived medical board provision, see note 47 supra.

329. See Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (paranoid schizophrenia from emotional pressures caused by inability to keep up with assembly line and foreman's berating for improper procedure in attempting to do so). The court said that its upholding compensation under the personal injury provision rendered unnecessary any discussion of the occupational disease provision's applicability. Id. at 593, 106 N.W.2d at 113. In Frazier v. Employers Mut. Cas. Co., 368 S.W.2d 955, 959 (Tex. Civ. App. 1963) (disabling neck pain from severe work pressures increasing over a year's time), the court held that because the disorder was not "traced to an incident occurring at a definite time and place," it was not an "injury" but a "disease," and said, "We are not called upon to decide whether such disease is compensable under our statute because such claim was not and is not made."

Cf. Marable v. Singer Business Machs., 92 N.M. 261, 586 P.2d 1090 (1978), in which the court held as a matter of law that "'severe neurotic mental depression' alleged to have been caused by continued mental and physical harassment by male employees on the loading dock who objected to a female dock employee" was not an occupational disease because it was not a natural incident of the particular employment, it was not linked with the process used by the employer, and it was not peculiar to claimant's occupation.

330. See Mich. Comp. Laws Ann. § 418.401 (Cum. Supp. 1979) ("'Personal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment."); Tex. Rev. Civ. Stat. Ann. art. 8306, § 20 (Vernon Cum. Supp. 1979) ("'Personal Injury' . . . shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom.").
indicated above, the reasons for the common law's failure to impose liability for negligence resulting in emotional disturbance alone have little, if any, application to workers' compensation systems that are not based upon fault principles and compensate only such relatively objective matters as medical care, disability, and death, but not pain and suffering. "Proximate cause" under the occupational disease provision need not be equated with common-law proximate cause in every respect, and should not be when the reasons for the common-law feature of proximate cause do not apply to workers' compensation.

Further, the rule that if negligence "results in . . . emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance," is not really a rule of noncausation; it is a rule of nonliability, despite the Restatement's placing it in the chapter on "causal relation." This is obvious from the fact that the rule posits that negligence "results" in emotional disturbance and concludes in terms of nonliability rather than in terms of noncausation. Furthermore, the reasons for the rule do not relate to lack of causation but to policies allegedly supporting nonliability, such as triviality of the harm.

At any rate, it may be that the type of triviality contemplated by the Restatement would be lacking in many, if not all, cases involving reasonably required medical treatment, disability, or death necessary for workers' compensation to apply. The Comment to the Restatement rule states that it "applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation" even when these disturbances are accompanied by "transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like," when such phenomena "are in themselves inconsequential and do not amount to any substantial bodily harm." But, significantly, the Comment goes on to say:

On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long

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331. See notes 305-12 supra and accompanying text.
333. See id., ch. 16, entitled "The Causal Relation Necessary to Responsibility for Negligence."
334. See id., Comment b, quoted in text accompanying note 284 supra.
335. Id., Comment c.
continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem, rather than one of law.\textsuperscript{336}

The Comment just quoted deems "illness" to go beyond the "emotional disturbance alone" specified by the Restatement. This indicates that meeting the "disease" requirement\textsuperscript{337} of the Minnesota occupational disease definition would alone, apart from the other considerations mentioned above,\textsuperscript{338} preclude an objection that "emotional disturbance alone" does not meet the definition's proximate cause requirement.

Accordingly, the Minnesota occupational disease provisions should apply to all consequences of emotional disturbance proximately caused by the employment, if the disease provisions otherwise are satisfied.

e. Superseding Cause

By requiring proximate cause in the occupational disease definition, the Minnesota Legislature may have intended to incorporate the concept of "superseding cause."\textsuperscript{339} As stated in a Washington case:

The legislature is presumed to have been familiar with the meaning of "proximate cause" as used by the courts, and that being so . . . it would follow that they meant that the condition of the . . . employment must be the proximate cause of the disease for which claim for compensation is made, and that the cause must be proximate in the sense that there existed no intervening independent and sufficient cause for the disease . . . \textsuperscript{340}

The Minnesota court has stated that a cause supersedes liability for negligence if:

(1) its harmful effects occurred after the original negligence;
(2) it was not brought about by the original negligence;

\textsuperscript{336} Id. (emphasis added).
\textsuperscript{337} See notes 362-78 infra and accompanying text.
\textsuperscript{338} See notes 331-36 supra and accompanying text.
\textsuperscript{339} See generally W. PROSSER, supra note 250, at 270-89; RESTATEMENT (SECOND) OF TORTS §§ 440-453 (1965).
\textsuperscript{340} Simpson Logging Co. v. Department of Labor & Indus., 32 Wash. 2d 472, 479, 202 P.2d 448, 452 (1949); see note 230 supra.
(3) it actively worked to bring about a result which would not otherwise have followed from the original negligence; and
(4) it was not reasonably foreseeable by the original wrongdoer.\textsuperscript{341}

This formulation could be modified to apply to the workers' compensation occupational disease setting by specifying that a cause supersedes occupational disease compensability if:

1. its harmful effects occurred after those of whatever it was about the employment that increased the risk of the disease;\textsuperscript{342}

2. it was not brought about by anything about the employment;\textsuperscript{343}

3. it actively worked to bring about the disease\textsuperscript{344} that would not otherwise have followed from whatever it was about the employment that increased the risk of the disease;\textsuperscript{345} and

4. it was not reasonably foreseeable by the employer.\textsuperscript{346}

Number (3) is probably the most important, since it prevents an intervening cause from supressing if it merely aggravates or heightens the effects of a disease that would have resulted from the employment without the intervening cause.\textsuperscript{347}

The operation of such an approach may be illustrated by Honer v. Nicholson,\textsuperscript{348} a 1936 common-law negligence case. In Honer the court found as a matter of law that a defendant's negligence was not the proximate cause of decedent's fatal pneumonia. Decedent's shoulder was sprained and he was otherwise bruised in a collision between the car in which he was riding and defendant's car.\textsuperscript{349} He missed work for a week and thereafter complained of

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\textsuperscript{341}. Cahill v. Peterson, 277 Minn. 26, 30, 151 N.W.2d 258, 260-61 (1967); Roberts v. Donaldson, 276 Minn. 72, 82, 149 N.W.2d 401, 408 (1967); Kroeger v. Lee, 270 Minn. 75, 78, 132 N.W.2d 727, 729-30 (1965); see Johnson v. Serra, 521 F.2d 1289, 1292 (8th Cir. 1975) (applying Minnesota law); 4 MINNESOTA PRACTICE JIG II, 142 G-S (2d ed. 1974).

\textsuperscript{342}. See discussion of "the employment" and "increased risk" in notes 156-221 supra and accompanying text.

\textsuperscript{343}. Cf. \textit{Restatement (Second) of Torts} § 442(c) (1965), referring to the intervening force "operating independently of any situation created by the actor's negligence."

\textsuperscript{344}. The reference is to "the disease" rather than "a result" because the court has held that a compensable result of an occupational disease need only arise out of, and need not be proximately caused by, the occupational disease. \textit{See} notes 243-46 supra and accompanying text.

\textsuperscript{345}. \textit{See} discussion of "the employment" and "increased risk" in notes 156-221 supra and accompanying text.

\textsuperscript{346}. If the employer is an artificial entity, the reference is to someone in the position of the employer.

\textsuperscript{347}. \textit{See} note 344 supra.

\textsuperscript{348}. 198 Minn. 55, 268 N.W. 852 (1936).

\textsuperscript{349}. \textit{Id.} at 55, 268 N.W. at 852.
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soreness and fatigue. Five weeks and three days after the accident, he was exposed for about an hour to severe cold while the car in which he was riding to work was being repaired. Although the attending physician opined that the pneumonia and death in no way resulted from the injury because the injury was “too far away in time,” two other doctors opined that the accident weakened the decedent’s resistance to the pneumonia germ and was a contributing cause of death. Reversing a judgment of liability, the court reasoned:

Taking the evidence of the plaintiff’s witnesses at full face value, as a matter of law it does not show connection as proximate cause between the accident complained of and the death of the plaintiff’s intestate. . . . The accident was too remotely connected with the death to be considered as a material factor in its connection therewith.

[I]f weakened resistance alone satisfied the requirement of proximate causation, the plaintiff should recover irrespective of the lapse of any time short of that of the statute of limitations. That, we think, shows the practical flaw in the thesis that justifies recovery for lowered resistance alone. That doctrine assumes intervention of a cause succeeding the original wrong but antecedent to the operation, as contributing cause, of the lowered resistance. If that intervening cause be dependent on his wrong, the first wrongdoer remains liable. But if it is independent of his wrong, as it must have been here of defendant’s negligence, it is settled law that there can be no recovery.

If the occupational disease definition’s proximate cause requirement incorporates the common law’s superseding cause concept, the Honer court’s approach regarding a negligence claim against a tortfeasor would apply to a workers’ compensation claim against an employer. Thus, compensation would be granted if pneumonia resulted directly from weakened resistance to pneumonia germs.

350. Id.
351. Id.
352. Id. at 56, 268 N.W. at 852.
353. Id. at 57-59, 268 N.W. at 853-54. For cases upholding common-law liability in which no cause, such as the exposure to severe cold as in Honer, intervened between the negligent conduct and the disease, see Anderson v. Anderson, 188 Minn. 602, 248 N.W. 35 (1933) (decedent became ill immediately after accident and died from pneumonia 52 days later); Healy v. Hoy, 115 Minn. 321, 132 N.W. 208 (1911) (death from pulmonary tuberculosis eight months after very severe injury); Keegan v. Minneapolis & St. L.R.R., 76 Minn. 90, 78 N.W. 965 (1899) (death from articular rheumatism four and one half months after spraining ankle because of defendant’s negligence).
caused by a stint of exhausting work substantially increasing the risk of contracting pneumonia beyond that of the general public. If, however, the employee would not have contracted pneumonia without a non-work one-hour exposure to severe cold five weeks later, the hour's exposure would have superseded occupational disease compensability because:

(1) its harmful effects occurred after those of the exhausting work;
(2) it was not brought about by anything about the employment;
(3) it actively worked to bring about the pneumonia that otherwise would not have followed from the exhausting work; and
(4) it was not reasonably foreseeable by the employer.

This approach is to be contrasted with that used for arising-out-of issues. For example, in Hanson v. Robitshek-Schneider Co., upholding death benefits for an employee's night time assault by robbers near his place of employment in a high crime part of the city, the court said:

Because of the intervening wrongful act of third parties or some such extrinsic contribution, the employment may not be the proximate cause. But it may be nonetheless so much source of the event that the latter in a very real and decisive sense arises out of the employment, much as a plant arises from the soil, although growth would have been impossible but for the seed.

354. For a discussion of the approach that might have been used if the pneumonia resulted from a "personal injury" at work, see note 249 supra and accompanying text.
355. See notes 266-81 supra and accompanying text.
356. See notes 176-221 supra and accompanying text.
357. See notes 341 and 344 supra and accompanying text.
358. A normal commuting trip to work as in Honer would not be considered an incident of the employment. See Satack v. Department of Pub. Safety, 275 N.W.2d 556, 557 (Minn. 1978); Kelley v. Northwest Paper Co., 190 Minn. 291, 292-93, 251 N.W. 274, 274-75 (1933); 1 A. Larson, supra note 18, § 15.11 (1978).
360. 209 Minn. 596, 297 N.W. 19 (1941).
361. Id. at 599, 297 N.W. at 21.

Regarding a criminal act as an intervening cause, see Hilligoss v. Cross Cos., 304 Minn. 546, 547, 228 N.W.2d 585, 586 (1975) (per curiam), and authorities cited therein.
4. **Disease**

To be covered by the occupational disease definition, the condition for which the employment increased the risk and that it proximately caused must be a "disease." Notwithstanding its superabundance of detail regarding the term "occupational," the Minnesota statute does not define, and has not defined, the term "disease." Nor do other states’ statutes, except that a few add a term of inclusion by providing that "occupational disease" means (occupational) "disease or illness,"362 "disease or infection,"363 or "ailment or disease."364

Professor Larson states simply, "The term 'disease' is construed in its broadest dictionary meaning of any 'serious derangement of health' or 'disordered state of an organism or organ.' "365 Encyclopediia Britannica also defines disease simply, as a "departure from the normal physiological state of a living organism sufficient to produce overt signs, or symptoms."366 Webster’s Dictionary is to the same effect, albeit at more length:

an impairment of the normal state of the living . . . body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors (as malnutrition, industrial hazards, or climate), to specific infective agents (as worms, bacteria, or viruses), to inherent defects of the organism (as various genetic anomalies), or to a combination of these factors . . . .

Similarly, medical dictionaries define disease as "[a]ny alteration or separation from health . . . . An abnormal state of the body which interrupts or disturbs the vital functions"368 and "an interruption, cessation, or disorder of body functions, systems, or organs. . . . A disease entity, characterized usually by at least two of these criteria: a recognized etiologic agent (or agents); an identifiable group of signs and symptoms; consistent anatomical altera-

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363. OR. REV. STAT. § 656.802(1)(a) (1977); WASH. REV. CODE ANN. § 61.08.140 (1962).

364. See MASS. GEN. LAWS ANN. ch. 149, § 1 (West 1971).

365. 1B A. LARSON, supra note 18, § 41.40, at 7-388 (quoting POCKET OXFORD DICTIONARY (1926 ed.)).

366. 5 ENCYCLOPAEDIA BRITANNICA MACROPAEDIA Disease 837 (1974).


In line with these broad definitions, Minnesota's occupational disease definition has been held applicable to disorders caused by trauma, stress, noise, dust, and fumes, as well as to those caused by temperature extremes and germs.

The Minnesota court, in explaining why applying time limitations to occupational disease cases had presented continuous difficulty and why the nature of occupational disease is repugnant to definite time limitations, drew the following distinction: "[U]nlike accidental injury with its sudden onset of disability, occupational disease is insidious in nature, generally involving a long and gradual period of development and varying degrees of disability."

371. See Schwartz v. City of Duluth, 264 Minn. 514, 119 N.W.2d 822 (1963) (coronary sclerosis caused by stress of firefighting). But cf. Hough v. Drevdahl & Son Co., 281 N.W.2d 690, 692 (Minn. 1979) (upholding denial for truck driver's heart trouble from stress because compensation court could find work stress "not significantly different from the stress to which ordinary living exposes everyone").
374. See Scott v. Southview Chevrolet Co., 267 N.W.2d 185 (Minn. 1978) (pulmonary emphysema from exhaust fumes); Boldt v. Josten's, Inc., 261 N.W.2d 82, 83 (Minn. 1977) (Goodpasture's Syndrome, "a rare disease which attacks the basement membrane of the kidneys and the alveolar lining cells of the lungs," from working with heated diploma glue); Meyer v. A.B. McMahan Co., 269 Minn. 73, 130 N.W.2d 46 (1964) (pulmonary fibrosis from chemical fumes).
376. See Gray v. City of St. Paul, 250 Minn. 220, 84 N.W.2d 606 (1957) (tuberculosis caused by patrol car duty with a tuberculous fellow police officer).
Similarly, the compensation court, in finding hearing loss from factory noise to be an occupational disease, noted that occupational disease "is generally something that develops gradually over a long period of time instead of suddenly and violently."  

V. COMPENSATION UNDER THE PERSONAL INJURY DEFINITION

The foregoing discussion has indicated that the only respect in which the occupational disease definition is more demanding than the personal injury definition is that it requires proximate causation. Now that the Legislature has omitted the "caused by accident" requirement from the personal injury definition, a claimant should be able to avoid the necessity of meeting the occupational disease definition's proximate cause requirement by proceeding (solely or in the alternative) under the statute's personal injury definition.  

That definition specifies in relevant part:

"Personal injury" means an injury arising out of and in the course of employment and includes personal injury caused by occupational disease, but does not cover an employee except while engaged in, on, or about the premises where his services require his presence as a part of such services at the time of the injury and during the hours of such service.  

As with the occupational disease definition, the personal injury definition has been held applicable to disorders caused by

The apparent reason for the court's referring to "accidental" injury despite the Legislature's 1953 removal of the words "by accident" from the "personal injury" definition, see note 50 supra and accompanying text, is that the Act still imposes a time limitation running "from the date of the accident." MINN. STAT. § 176.151(1) (1978).


379. See notes 148-378 supra and accompanying text.

380. See note 50 supra and accompanying text.


382. Id. It goes on to provide:

Where the employer regularly furnished transportation to his employees to and from the place of employment such employees are subject to this chapter while being so transported, but shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.

Id.

383. See notes 370-76 supra and accompanying text.
trauma, stress, fumes, temperature extremes, and germs. Personal injury coverage has also been upheld for her- 
nia or heart attack caused by exertion. Additionally, and 
very significantly, the court has specified that work-related aggra-
vation of a preexisting disease (as well as a preexisting injury) con-
stitutes a “personal injury” under the statute:

It is well recognized that a preexisting disease or infirmity of 
the employee does not disqualify a claim arising out of employ-
ment if the employment aggravated, accelerated, or combined 
with the disease or infirmity to produce disability for which 
compensation is sought. Common examples include hyper-
trophic arthritis; cancer or malignant tumor; degener-
ative process involving the brain; paresis accelerated by 
injuries to the head; and innumerable phases of heart dif-
ficulties.

384. See Lakics v. Lane Bryant Dep’t Store, 263 N.W.2d 608 (Minn. 1978) (cancer in sinus from injury to bony structure of nose); Barcel v. Barrel Finish, 304 Minn. 536, 232 N.W.2d 13 (1975) (carpal tunnel syndrome); Fuller v. Pacific Intermountain Express Co., 271 Minn. 470, 136 N.W.2d 307 (1965) (knee cancer from crate falling on knee); Pittman v. Pillsbury Flour Mills, Inc., 234 Minn. 517, 48 N.W.2d 735 (1951) (breast cancer from body of electric drill hitting breast).


387. See Ueltschi v. Certified Ice & Fuel Co., 201 Minn. 302, 276 N.W. 220 (1937) (heatstroke caused by working on three very hot days); State ex rel. Rau v. District Court, 138 Minn. 250, 164 N.W. 916 (1917) (sunstroke from hot afternoon’s work). See generally B A. LARSON, supra note 18, § 38.40.

388. See State ex rel. Rau v. District Court, 137 Minn. 435, 163 N.W. 755 (1917) (gonorrheal infection from germs introduced when a particle that cut employee’s eyeball was removed); cf. Pechavar v. Oliver Iron Mining Co., 196 Minn. 558, 265 N.W. 429 (1936) (eye ulcer caused by infection either from particle that caused inflammation of employee’s eye at work or treatment of eye). See generally B A. LARSON, supra note 18, §§ 40.20-50; W. MALONE, M. PLANT & J. LITTLE, supra note 179, at 254-62.


391. Gillette v. Harold, Inc., 257 Minn. 313, 323, 101 N.W.2d 200, 204 (1960) (citations omitted) (upholding personal injury coverage for aggravation of preexisting deteriorative foot disorder by sales clerk’s work requiring her to be constantly on her feet seven
The law is clear that a claimant may proceed under the personal injury definition for any of the foregoing disorders, notwithstanding the fact that some of them also could be characterized as occupational diseases.

This overlap has been recognized explicitly on several occasions. In *Fehling v. Dayton Rogers Manufacturing Co.*, the compensation court found the longer time-for-notice provision applicable to hearing loss from factory noise because it was an occupational disease rather than a personal injury. Reasoning that occupational loss of hearing had most of the characteristics of occupational disease and more logically fell within that classification, the court noted, "Needless to say, of course, there will be factual situations that may be logically called a 'personal injury' or 'occupational disease.'"

In *Jensen v. Kronick's Floor Covering Service*, the Minnesota Supreme Court, upholding occupational disease coverage for a carpet layer's carpal tunnel syndrome from repetitive minute trauma, quoted the occupational disease definition and stated:

The statutory definition does not set out criteria from which one can exclusively classify the impairment resulting from repetitive minute trauma as either personal injury or occupational disease. Although the compensation board has heretofore treated this type of impairment as a personal injury, there is no sound basis in law or logic for reversing its
classification pursuant to the expert medical testimony and factual findings of this case.\textsuperscript{400}

In \textit{Young v. Ammerman Co.},\textsuperscript{401} upholding a pretrial order dismissing certain insurers because there was no showing that the employee’s pulmonary condition originated during the time they were insuring the risk, but refusing to dismiss subsequent employers and insurers on the ground that apportionment might be appropriate,\textsuperscript{402} the compensation court said:

It should be noted that employee’s condition may be both a personal injury and an occupational disease, or mixed. The nature of the lung condition, when it was contracted, or when it became disabling, and the issue of apportionment all require holding Ammerman Company and Employers Mutual Casualty Company and all subsequent employers and their insurers in. If the condition is either a personal injury or a mixed condition which can be designated either as a personal injury or occupational disease, [Minnesota Statutes section 176.66(3)] would not apply.\textsuperscript{403}

A former statute provided that “[n]either the employe nor his dependents shall be entitled to compensation for disability or death resulting from disease unless the disease...\textsuperscript{404}

Thus the compensation court in \textit{Young} was saying that if an em-
ployee’s condition came within the personal injury definition, the claimant could proceed entirely under that provision and not be bound by the stricter provisions regulating workers who proceed under the occupational disease definition.

If the *Young* decision was correct as to the former provision barring compensation for an occupational disease not contracted within twelve months before disablement, the same approach must be applied to the definition’s provision that “[a]n employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause.”

A worker who cannot show that the employment proximately caused the disease should be able to proceed under the personal injury provision.

Accordingly, it remains only to determine what diseases appropriately may be characterized as “personal injuries.” As indicated above, certain diseases caused by trauma, stress, fumes, temperature extremes, germs entering through wounds, or exertion are clearly capable of such characterization, as are work-related aggravations of preexisting diseases.

More broadly, *any* disease may be characterized as a “personal injury.” Professor Larson’s black letter definition of “personal injury” is “any harmful change in the body” that “may include such injuries as disease.” Similarly, Encyclopedia Britannica defines

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405. *See* note 45 *supra* and accompanying text.

406. Regarding diseases from germs entering otherwise than through wounds, see Andreason v. Industrial Comm’n, 98 Utah 561, 563-64, 102 P.2d 894, 895 (1940) (“If the inhalation of gas . . . is an injury, is there any reason why the inhalation or swallowing of germs is not an injury?”); IB A. LARSON, *supra* note 18, § 40.30 (“the majority of cases hold the unexpected contraction of infectious disease to be an injury by accident”); W. MALONE, M. PLANT & J. LITTLE, *supra* note 179, at 256-62; cf. Pechavar v. Oliver Iron Mining Co., 196 Minn. 558, 265 N.W. 429 (1936) (infection of eye that was inflamed but not bleeding when particle entered it).

407. *See* notes 383-90 *supra* and accompanying text.

408. *See* note 391 *supra* and accompanying text.

409. IB A. LARSON, *supra* note 18, § 42.00 (emphasis added), which states in relevant part, “‘Personal injury’ includes any harmful change in the body. It need not involve physical trauma, but may include such injuries as disease, sunstroke, nervous collapse, traumatic neurosis, hysterical paralysis, and neurasthenia.” *See* 4 A. LARSON, *supra*, at 643 (1980) (“‘Injury’ means any harmful change in the human organism arising out of and in the course of employment, including damage to or loss of a prosthetic appliance, but does not include any communicable disease unless the risk of contracting such disease is increased by the nature of the employment.” (footnote omitted)) (quoting COUNCIL OF STATE GOVERNMENTS, MODEL WORKMEN’S COMPENSATION ACT § 2(a) (1974)); KY. REV. STAT. § 342.620(1) (1977 & Cum. Supp. 1980) (substantially identical); WYO. STAT. ANN. § 27-12-102(a)(xii) (1977) (substantially identical except specifies “other than nor-
injury as "any damage done the body, particularly by an outside
force."^410 (A risk-increasing facet of the employment would qual-
ify as an outside force.) The Minnesota court has quoted with ap-
proval the Iowa court's statement, "The injury to the human body
must be something... that acts extraneously to the natural
processes of nature, and thereby impairs the health, overcomes, in-
jures, interrupts, or destroys some function of the body, or other-
wise damages or injures a part or all of the body."^411

In 1946 when the "caused by accident" requirement was still
included in the personal injury definition, the Minnesota court
recognized that disease is injury by saying, "Compensation liabil-
ity follows whenever the employe sustains an injury, whether acciden-
tal or occupational, if it arises out of and in the course of his
employment."^412 In light of the statutory development at the
time, the court was necessarily referring to "accidental injury" and
"occupational disease injury," the latter recognizing disease as in-
jury.

Many states' compensation statutes recognize that diseases are
injuries by defining "injury" or "personal injury" specifically to
include occupational disease.413 California's statute is even more
straightforward by specifying that "Injury includes any injury or
("damage or harm to the physical structure of the body"); Wis. Stat. Ann. § 102.01(c)
(West Cum. Supp. 1979-1980) ("mental or physical harm to an employe caused by acci-
dent or disease").

410. V Encyclopaedia Britannica Micropaedia Injury 357 (1974); see Webster's
Third New International Dictionary of the English Language Unabridged
1164 (1976) ("hurt, damage, or loss sustained"); cf. B. Maloy, The Simplified Medical
Dictionary for Laywers 323 (2d ed. 1951) ("A hurt suffered by a person or a thing; a
hurt or damage sustained, as a severe injury. A hurt of any sort; a wound; a maim, a
lesion."); Stedman's Medical Dictionary 709 (4th unabridged lawyers' ed. 1976)
("Damage; trauma; an accidental or inflicted wound.").

Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 731, 254 N.W. 35, 39 (1934)).

412. Sandy v. Walter Butler Shipbuilders, Inc., 221 Minn. 215, 218, 21 N.W.2d 612,
614 (1946) (emphasis added).

Minnesota's statute specifies that disease is injury in at least one context—the special fund provision includes a subdivision stating that "an occupational disease may be deemed to be the personal (second) injury." 415

Another way to view the matter is to recognize that, whether or not disease is injury, disease can cause injury. The Minnesota statutes specifically recognize that occupational disease can cause injury, by specifying, "Personal injury. . . includes personal injury caused by occupational disease,"416 and by providing different time-for-notice limitations "[i]n the case of injury caused by . . . occupational disease."417 If occupational disease can cause injury, so can other disease. If injury caused by disease arose "out of and in the course of employment" while the employee was "engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service,"418 the employee should be able to disregard the fact that the injury was caused by disease and focus merely upon the fact that the injury met the statute's requirements for coverage as a "personal injury."

Some might object that allowing a claimant to seek compensation for a disease under the personal injury definition would contravene a legislative intent that disease be compensated only upon meeting the occupational disease definition, indicated by the Legislature's keeping the occupational disease definition in force after

414. CAL. LAB. CODE § 3208 (West Cum. Supp. 1980); cf. MASS. ANN. LAWS ch. 152, § 1(7A) (Michie/Law. Coop. 1976) ("'Personal injury' includes infections or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment.").

415. MINN. STAT. § 176.131(7) (1978). This section states that under subdivisions 1 and 2, providing for reimbursement of an employer whose employee incurs personal injury and suffers disability that is substantially greater, because of a preexisting physical impairment, than what would have resulted from the personal injury alone, occupational disease may be deemed to be the personal (second) injury. According to the statute:

If the subsequent disability for which reimbursement is claimed is an occupational disease, and if, subsequent to registration as provided by subdivisions 4 and 5, the employee has been employed by the employer in employment similar to that which initially resulted in such occupational disease, no reimbursement shall be paid to the employer.

Id.


417. Id. § 176.151(4), quoted in note 145 supra.
418. Id. § 176.011(16).
omitting the "caused by accident" requirement from the personal injury definition. But there are a number of responses to this objection.

First, it may be that the Legislature in 1953 did not take the time to contemplate in full detail the consequences of omitting "caused by accident" for "personal injury" coverage of disease.419

Second, at the same time as it adopted the occupational disease definition in 1943, the Legislature expressly provided:

> Nothing in this section [providing compensation for disability or death from occupational disease] affects the rights of an employee to recover compensation in respect to a disease to which this section does not apply if the disease is an accidental personal injury within the meaning of the other provisions of this act.420

This provision, which remained in effect until 1973,421 clearly showed that the Legislature did not intend to restrict disease coverage to the occupational disease definition. It also constituted legislative recognition that disease can fall within the "personal injury" definition, by recognizing that it could fall within the stricter "personal injury caused by accident" definition of the former statute.

This contrasts sharply with those state legislatures that have excluded disease from injury or personal injury coverage.422 Far from taking a restrictive approach toward the definition of personal injury, the Minnesota Legislature has taken a very expansive approach by making Minnesota one of the first states, and still one of only eight states, to dispense with the requirement that personal

419. For example, it was not until 20 years later that the Legislature repealed a provision referring to "accidental personal injury," see Act of May 24, 1973, ch. 643, § 12, 1973 Minn. Laws 1584, 1594 (repealing the provision quoted in text accompanying note 420 infra), and changed a provision to have disablement resulting from an occupational disease regarded as a "personal injury" rather than "the happening of an accident." See id. § 11, 1973 Minn. Laws at 1594. Further, Minn. Stat. § 176.151(1) (1978) still sets a time limit "not to exceed six years from the date of the accident," although section 176.151(2) specifies "six years from the date of injury" and section 176.141 (quoted in note 146 supra) makes time for notice run "from the occurrence of the injury." (emphasis added).


Finally, interpreting "personal injury" to include disease does not deprive the occupational disease definition of all significance. It still has the following consequences that can explain the Legislature's having kept it in force after omitting the personal injury definition's caused-by-accident requirement:

(1) Since the occupational disease definition includes no language like that in the personal injury definition specifying that it "does not cover an employee except while engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service," the occupational disease definition may apply when the disease only arose in the course of employment, as opposed to occurred in the course of employment. As Professor Larson has noted, "'Arising' connotes origin, not completion or manifestation." Thus, a claimant whose disease was caused by the employment but did not occur at work would want to proceed, at least in the alternative, under the occupational disease definition.

(2) A claimant has a much longer time within which to give notice of injury if the injury was caused by occupational disease. Thus, a claimant who has failed to give notice within 180 days would want to show that the injury was caused by occupational disease in order to be permitted to give notice anytime "within three years after the employee has knowledge of the cause of such injury and the injury has resulted in disability."

423. See note 50 supra.
426. See notes 145-46 supra and accompanying text.
427. See MINN. STAT. § 176.141 (Supp. 1979), quoted in note 146 supra.

It should be noted that the compensation court has ruled that the shorter time period for notice of injuries generally does not commence running until the employee has knowledge of the "probable compensable character" of the injury. See Kitt v. McGlynn Bakeries, Inc., 30 Minn. Workers' Comp. Dec. 213, 215 (1977). Although the employee in Kitt had a heart attack in November, 1975, he did not learn of its probable work-related nature until June, 1976. The compensation court held that he had 90 (now 180) days from June of 1976 in which to give notice. Id. at 214-15.
(3) The three-year time-for-notice provision also applies to commencement of proceedings when the injury was caused by occupational disease,\textsuperscript{429} rather than the normal personal injury provisions governing time for commencement of proceedings.\textsuperscript{430}

(4) "Second injury" reimbursement to the employer from the special fund is precluded in certain circumstances "[i]f the subsequent disability for which reimbursement is claimed is an occupational disease."\textsuperscript{431}

VI. THE PRESUMPTION

The last sentence of the occupational disease provision specifies:

If immediately preceeding the date of his disablement or death, an employee was employed on active duty with an organized fire or police department of any municipality, as a member of the Minnesota highway patrol, conservation officer service, state crime bureau, as a forest officer by the department of natural resources, or sheriff or full time deputy sheriff of any county, and his disease is that of myocarditis, coronary sclerosis,

\textsuperscript{429} See Minn. Stat. § 176.151(4) (1978), quoted in note 145 supra.

\textsuperscript{430} Minn. Stat. § 176.151 (1978) provides in part:

The time within which the following acts shall be performed shall be limited to the following periods, respectively:

(1) Actions or proceedings by an injured employee to determine or recover compensation, three years after the employer has made written report of the injury to the commissioner of the department of labor and industry, but not to exceed six years from the date of the accident.

(2) Actions or proceedings by dependents to determine or recover compensation, three years after the receipt by the commissioner of the department of labor and industry of written notice of death, given by the employer, but not to exceed six years from the date of injury, provided, however, if the employee was paid compensation for the injury from which the death resulted, such actions or proceedings by dependents must be commenced within three years after the receipt by the commissioner of the department of labor and industry of written notice of death, given by the employer, but not to exceed six years from the date of death. In any such case, if a dependent of the deceased, or any one in his behalf, gives written notice of such death to the commissioner of the department of labor and industry, the commissioner shall forthwith give written notice to the employer of the time and place of such death. In case the deceased was a native of a foreign country and leaves no known dependent within the United States, the commissioner of the department of labor and industry shall give written notice of the death to the consul or other representative of the foreign country forthwith.

(3) In case of physical or mental incapacity, other than minority, of the injured person or his dependents to perform or cause to be performed any act required within the time specified in this section, the period of limitation in any such case shall be extended for three years from the date when the incapacity ceases.

\textsuperscript{431} See note 415 supra and accompanying text.
pneumonia or its sequel, and at the time of his employment such employee was given a thorough physical examination by a licensed doctor of medicine, and a written report thereof has been made and filed with such organized fire or police department, with the Minnesota highway patrol, conservation officer service, state crime bureau, department of natural resources, or sheriff’s department of any county, which examination and report negatived any evidence of myocarditis, coronary sclerosis, pneumonia or its sequel, the disease is presumptively an occupational disease and shall be presumed to have been due to the nature of his employment. 432

In the 1941 case of Kellerman v. City of St. Paul, 433 the Minnesota court upheld the validity of this provision’s predecessor that was applicable only to firefighters, 434 saying:

The apparent high percentage of occurrence of coronary sclerosis among firemen demonstrates that the legislature was not arbitrary in providing for them as a class. Relator asserts that other occupations were shown to be susceptible to coronary sclerosis. The legislature “is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may ‘proceed cautiously, step by step,’ and ‘if an evil is specially experienced in a particular branch of business’ it is not necessary that the prohibition ‘should be couched in all-embracing terms.’” 435

In Ogren v. City of Duluth, 436 the court described the operation of the presumption in the provision’s predecessor as follows:

It is well settled that a presumption is not evidence, but is rather a rule of law dictating decision on unopposed facts and shifting the burden of going forward with the evidence. . . . The presumption obtains until substantial proof to the contrary is introduced. Then it ceases and vanishes from the case. The
case is then to be decided by the trier of the fact the same as if the presumption had never existed.\textsuperscript{437}

This approach, consistent with Minnesota's approach to presumptions generally,\textsuperscript{438} has been confirmed in cases arising under the current provision. Thus, the court stated in 1977, "We have frequently characterized this statutory presumption as a rule of evidence. It is not evidence. It is rather, 'a rule of law dictating decision on unopposed facts.'\textsuperscript{439}

Compensation has been denied for a police chief's coronary sclerosis on the ground that the presumption was rebutted,\textsuperscript{440} and has been awarded for firefighters' coronary sclerosis only on the basis that medical evidence sufficiently linked the employment with the disease.\textsuperscript{441} The presumption itself does not appear to have been a basis for compensation in reported cases.

If the Minnesota Legislature wanted the presumption to have more effect, as such presumptions do in other states,\textsuperscript{442} it should have specified a shifting of the burden of proof, as it did regarding the defenses of employee intoxication and intentional self-infliction of injury,\textsuperscript{443} or a conclusive presumption, as it did regarding depen-

\textsuperscript{437} \textit{Id.} at 564, 18 N.W.2d at 540.

\textsuperscript{438} \textit{See} MINN. R. EVID. 301. \textit{See generally} 11 P. THOMPSON, MINNESOTA PRACTICE §§ 301.01-03 (1979); \textit{Thompson, Presumptions and the New Rules of Evidence in Minnesota}, 2 WM. MITCHELL L. REV. 167 (1976).


\textsuperscript{440} \textit{See} Roope v. City of Austin, 23 Minn. Workmen's Comp. Dec. 9, 15 (1963).

\textsuperscript{441} \textit{See} Schwartz v. City of Duluth, 264 Minn. 514, 518-20, 119 N.W.2d 822, 825-26 (1963); \textit{Anderson v. City of Minneapolis}, 258 Minn. 221, 227-28, 103 N.W.2d 397, 401-02 (1960); \textit{Ogren v. City of Duluth}, 219 Minn. 555, 563-66, 18 N.W.2d 535, 539-41 (1945); \textit{Kellerman v. City of St. Paul}, 211 Minn. 351, 354-55, 1 N.W.2d 378, 380 (1941); \textit{cf. Jerabek v. City of Rochester}, 281 N.W.2d 714, 715 (Minn. 1979) (coronary sclerosis presumption rebutted but medical evidence sufficiently linked firefighter's employment with heart attack).

\textsuperscript{442} \textit{See} 1B A. LARSON, \textit{supra} note 18, § 41.72(a); \textit{cf. MINNESOTA WORKERS' COMPENSATION STUDY COMMISSION, A REPORT TO THE MINNESOTA LEGISLATURE AND GOVERNOR} 20 (1979) (statutes similar to Minnesota's construed to have greater effect) [hereinafter cited as \textit{STUDY COMM'N}].

\textsuperscript{443} \textit{See} MINN. STAT. § 176.021(1) (1978); \textit{cf. Olson v. Felix}, 275 Minn. 335, 337, 146 N.W.2d 866, 867 (1966) (employer did not prove intoxication was proximate cause); \textit{Beach v. American Steel & Wire Div.}, 248 Minn. 11, 15-16, 78 N.W.2d 371, 375 (1956) (employer did not prove intentional self-infliction).
dency of spouses and young children to be eligible for benefits. But the Legislature should not endeavors to increase the presumption's effect. Rather, as suggested by the Minnesota Workers' Compensation Study Commission, it should remove the presumption. There is no adequate reason for treating the few specified employees and diseases differently from other employees and diseases.

VII. CONCLUSION

Victims of work-related disease seldom were compensated by the common law. Placing this burden upon the individual worker was perceived to be an unjustified consequence of industrialization, more properly placed upon industry as a cost of its product and passed on to consumers. Accordingly Minnesota, like other Anglo-American jurisdictions, evolved a statutory scheme to compensate workers victimized by work-related disease. The excessive length of Minnesota's occupational disease definition appears to make a disease compensable only when a labyrinth of multiple factors are satisfied. In spite of its length, however, all


A "prima facie" provision, such as that specifying "[c]hildren 18 years of age, or over 18 when physically or mentally incapacitated from earning, are prima facie considered dependent," Minn. Stat. § 176.111(2) (1978), would probably not produce any greater effect than a simple presumption. See Jannetta v. Milwaukee W. Fuel Co., 225 Minn. 318, 322, 30 N.W.2d 683, 685 (1948) (provision as to incapacitated child completely rebutted by showing employee provided nothing of consequence by way of support for years); Johnson v. Munsingwear, Inc., 222 Minn. 540, 544-45, 25 N.W.2d 308, 311 (1946) (provision as to child of certain age partly rebutted by showing employee provided only part of child's support). The Johnson court did not specifically refer to the prima facie effect vanishing in the face of substantial contrary proof, but it referred to the provision as a rebuttable presumption, see id. at 544, 25 N.W.2d at 311, and it cited the Ogren case, see notes 436-37 supra and accompanying text.

Johnson also cited Wojtowicz v. Belden, 211 Minn. 461, 1 N.W.2d 409 (1942), in which the court had held that the prima facie case of negligence created by violation of a traffic statute "prevails in the absence of evidence invalidating it" and said "if there is such evidence, the issue is for the jury." Id. at 465, 1 N.W.2d at 410-11.

445. See Study Comm'n, supra note 442, at 20.

446. Cf. Solomons, supra note 47, at 224 ("Nonspecific diseases such as stress-induced heart disease or emotional disorders can be dealt with by shifting the burden of proof of causal relationship from the employee to the employer.").
the definition really requires is that the employment increase the risk of and proximately cause the disease. Injured workers also have the option to seek compensation for disease under the personal injury provision of the Minnesota workers' compensation law.

A claimant should be allowed to recover compensation for medical treatment, disability, or death from disease under the personal injury definition without having to satisfy the proximate causation requirements of the occupational disease provision. If the claimant has difficulties under the personal injury definition because of that definition's premises and hours-of-service requirements or because of time-for-notice or time-for-commencement-of-proceedings considerations, the claimant should be allowed to proceed, solely or in the alternative, under the occupational disease provision with its proximate cause requirement.

The occupational disease provision justifiably exacts proximate cause in return for dispensing with the premises and hours requirement. As stated by Professor Larson,

[T]he "course of employment" and "arising out of employment" tests . . . should not be, applied entirely independently; they are both parts of a single test of work-connection, and therefore deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.

Whether requiring proximate cause is the best way to enhance the occupational disease causation requirement is questionable. The National Commission on State Workmen's Compensation Laws, the Council of State Governments, and some states' statutes take the position that "arising out of" is a sufficient causation requirement.

447. See notes 379-431 supra and accompanying text.
448. See note 424 supra and accompanying text.
449. See notes 426-30 supra and accompanying text.
450. See notes 222-361, 424-30 supra and accompanying text.
451. See notes 424-25 supra and accompanying text.
452. IA A. LARSON, supra note 18, § 29.00 (1979).
453. See note 245 supra and accompanying text.
454. NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 50 (1972) (Recommendation 2.14) ("We recommend that the 'arising out of and in the course of employment' test be used to determine coverage of injuries and disease.").
455. COUNCIL OF STATE GOVERNMENTS, WORKMEN'S COMPENSATION AND REHABILITATION LAW § 2(a) (1974), reprinted in 4 A. LARSON, supra note 18, at 643 (1980) ("'Injury' means any harmful change in the human organism arising out of and in the course of employment . . . but does not include any communicable disease unless the risk of contracting such disease is increased by the nature of the employment.").
456. See CAL. LAB. CODE § 3208 (West Cum. Supp. 1980); DEL. CODE ANN. tit. 19,
sation requirement for disease. But if the proximate cause concept is applied appropriately, it should be satisfactory as long as the claimant has the option of dispensing with it by meeting the personal injury definition’s premises and hours requirements for compensating the disease as a personal injury.

These considerations justify keeping the occupational disease definition in the statute. But they do not justify the definition being so long and cumbersome when all it really requires is that the employment increase the risk of and proximately cause the disease. Nor do these considerations justify a presumption offering special treatment for diseases contracted by public officers. The Legislature should remove the occupational disease presumption and amend the definition to specify simply, “‘Occupational disease’ means bodily or mental harm that is proximately caused by and the risk of which is increased by the employment.”

§ 2301(4) (1979); ILL. ANN. STAT. ch. 48, § 172.36(d) (Smith-Hurd Supp. 1979); WIS. STAT. ANN. § 102.03(2)(3) (West 1973); cf. ALASKA STAT. § 23.30.265(13) (1972) (“arises naturally out of the employment” (emphasis added)); D.C. CODE ENCYCL. § 36-501 ¶ 13 (West 1968) (same); MD. ANN. CODE art. 101, § 22(a) (1979) (“due to the nature of the occupation or process”); MASS. GEN. LAWS ANN. ch. 149, § 1 (West 1971) (“caused by the nature or circumstances of the employment”); WYO. STAT. § 27-12-102(a)(xii) (1977) (“arising out of” except communicable disease “unless the risk of contracting the disease is increased by the nature of the employment”).

457. See notes 222-361 supra and accompanying text.
458. See notes 379-431 supra and accompanying text.
459. See notes 152-221 supra and accompanying text.
460. See notes 432-46 supra and accompanying text.
461. See notes 362-78 supra and accompanying text; cf. WIS. STAT. ANN. § 102.01(2)(c) (West Supp. 1979) (“‘Injury’ means mental or physical harm to an employee caused by accident or disease . . . .”).

It should be noted that by specifying “bodily or mental harm” rather than “disease,” this would more clearly apply to “delayed action” injury situations, see 1A A. LARSON, supra note 18, §§ 29.21-22 (1979), producing effects not commonly regarded as diseases. In Hed v. Brockway Glass Co., 309 Minn. 73, 244 N.W.2d 28 (1976), the Minnesota court upheld compensation in what seems to be a “delayed action” situation without indicating that it perceived any unusual “course” problem and without referring to the premises and hours requirements. The employee received compensation for injuries caused by his driving into a tree after driving about a mile on his trip home from the plant, apparently after falling asleep or blacking out from fatigue caused by working three strenuous, abnormally long days. Id. at 74-76, 244 N.W.2d at 29. The only apparent alternative to a “delayed action” rationale is to conclude that the employee’s fatigue at work was a “personal injury” on the premises and during the hours, and that the car accident was a “direct and natural consequence” of the “personal injury.” See note 249 supra and accompanying text.

462. Another appropriate approach would be to delete simultaneously the personal injury definition’s premises and hours requirements and repeal the occupational disease definition. Few states accord with Minnesota in specifying premises or hours requirements in addition to an “in the course” requirement. See, e.g., N.M. STAT. ANN. § 52-1-19.
(1978); Wyo. Stat. § 27-12-102(a)(xii) (1977); 4 A. Larson, supra note 18, at 511-23 (1980). Many states' statutes include disease or occupational disease within their "injury" or "personal injury" definitions, see notes 413-14 supra and accompanying text, and a number of states as well as the National Commission on State Workmen's Compensation Laws and the Council of State Governments consider "arising out of" to be a sufficient causation requirement for disease. See notes 454-56 supra and accompanying text.