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Legislation-Indiana Workmen's Disease Act- Silicosis

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LEGISLATION.—*Indiana Workmen's Occupational Diseases Act: Silicosis: The death of over 400 workers on the Gauley Bridge tunnel in West Virginia from silicosis focused public attention on occupational diseases legislation.*¹ In an

(real estate board); *Solow v. Genl. Motors Truck Co.* (1933), 64 F. (2d) 105 (creditor). See also: *Restatement, Agency* (1933), § 470, Comment b.

⁸ *Clark v. Molyneux* (1877), L. R. 3 Q. B. D. 237, Bohlen and Harper, *Cases on Torts*, p. 629 and cases cited in note 87; also, *Hallen, Conditional Privilege in Defamation* (1931), 25 Ill. L. R. 865, 868.

⁹ *Toothaker v. Conant* (1898), 91 Me. 438, 40 A. 331; *Russell v. Pennsylvania Mut. Life Ins. Co.* (1935), 118 Pa. Super. 351, 179 A. 798; *Restatement, Torts* (1938), § 599 ff.; *Hallen, Conditional Privilege in Defamation* (1931), 25 Ill. L. Rev. 865.

¹⁰ The result in the instant case is well supported. The malice necessary to overcome the defense of privilege may be shown by the manner and circumstances surrounding the publication, or by the publication itself. *Sunley v. Metropolitan Life Ins. Co.* (1906), 132 Ia. 123, 109 N. W. 463, 12 L. R. A. (N. S.) 91; *Walgreen Co. v. Cochran* (1932), 61 F. (2d) 357; *Conrad v. Allis-Chalmers Mfg. Co.* (1934), 228 Mo. App. 817, 73 S. W. (2d) 438. The inference of malice may exist in the reckless disregard of the rights of the persons defamed. *Locke v. Bradstreet* (1885), 22 F. 771; *Conrad v. Allis-Chalmers Mfg. Co.* (1934), 228 Mo. App. 817, 73 S. W. (2d) 438. The privilege is lost when the libellous statements are made without proper cause or when reasonable care is not exercised in investigating the truth of the statements before they are published. *Locke v. Bradstreet* (1885), 22 F. 771; *J. Hartman & Co. v. Hyman* (1926), 287 Pa. 78, 134 A. 486, 48 A. L. R. 567; *Commonwealth v. Foley* (1928), 292 Pa. 277, 141 A. 50; *Rosenberg v. Mason* (1931), 157 Va. 215, 160 S. E. 190. In some cases the defendant must sustain the burden of establishing reasonable grounds for making the libellous statements in order to establish the privilege. *Hodgkins v. Gallagher* (1922), 122 Me. 112, 119 A. 68; *Russell v. Pennsylvania Mut. Life Ins. Co.* (1935), 118 Pa. Super. 351, 179 A. 798. The privilege being lost, the libel becomes actionable *per se*.

¹ N. Y. Times, Feb. 8, 1936, p. 5. See Hearings before the Subcommittee of the Committee on Labor on H. J. Res. 449, 74th Congress, 2d Sess. (1936). 500,000 to 1,200,000 individuals in the mechanical and manufacturing industries of the United States alone are exposed to a silicosis hazard. Since the effective date of the Indiana act 12 cases of occupational diseases due to dust have appeared before the Industrial Board, 2 cases being definitely classed as

effort to meet the problem many states passed compensation statutes for disabilities and death due to silicosis and other occupational diseases.²

"Pneumoconiosis" is the generic term for lung diseases resulting from the inhalation of dust. "Silicosis" is the more definite, limited term describing one of the diseases produced by breathing air containing silica dust in minute particles.³ The clinical characteristics of silicosis are a shortness of breath, a decreased chest expansion, a lessened capacity for work, an absence of fever, and an increased susceptibility to tuberculosis, some or all of which symptoms may be present, and the characteristic X-ray findings.⁴

Liability Prior to the Occupational Diseases Act: In nearly all states where the statutes do not clearly compensate for silicosis the employee's remedy lies in the common law.⁵ Indiana has allowed a recovery at common law (supplemented by the Employer's Liability Act of 1911; Burns' Ind. Stat. 1933, § 40-1111) for death from disease contracted because of the employer's negligence.⁶ The other states allowing recovery at common law base the action upon the negligence of the employer, either in failing to warn of a danger the employee was incurring or in failing to provide a safe place to work.⁷ The cases

silicosis. See Year Book of Indiana (1938), p. 1018-1019, published by the Division of Accounts and Statistics.

Sayers, *Silicosis* (1932), p. 2-6, published by permission of the Surgeon General, U. S. Public Health Service, No. B-52, shows a knowledge of silicosis from the time of Hippocrates to the present.

² The Indiana act became effective June 7, 1937, Acts of 1937, c. 69, p. 334; Burns' Ind. Stat. 1933, § 40-2201 *et seq.* See notes 19, 20, 21 for a list of the acts compensating for silicosis. The customary advances of the English in labor legislation is shown by the fact that the English Workmen's Compensation Act was amended in 1906 to include occupational diseases, Stat. at Large, 6 Edw. VII (1906), c. 58, § 8(1), p. 332.

³ Sayers and Jones, *Silicosis and Dust Diseases (Medical Aspects and Control)* (1936), p. 1, 2, published by the Division of Industrial Hygiene, U. S. Public Health Service, No. B-1345. "Silicosis, in simple lay language, is caused by breathing silica dust. Tiny particles of silica, too fine to be seen even with a good microscope, are breathed into the lungs. A chemical action leads nature in self-defense to build a wall of fibre around the poison. An increasing number of these fibrous lumps—"Nodules" to you and the X-ray man—gradually block off the blood supply and finally the air-passageways. Distressing shortness of breath and finally plain suffocation may result. Naturally the victims are "susceptible" to tuberculosis which carries off about three-fourths of them while pneumonia gets another 15 per cent. Enlarged hearts from attempting to force blood through hardening arteries, completes the story," Andrews, *The Tragedy of Silicosis* (1936), 26 Am. Labor Leg. Rev. 4.

⁴ This is the definition adopted by the Committee on Pneumoconiosis of the Industrial Hygiene Section of the Am. Public Health Assn. at the Nov., 1932 meeting.

⁵ Mississippi and Arkansas still have no compensation laws, although Arkansas has amended its constitution to allow the enactment of such a statute. For a list of the statutes clearly compensating silicosis see notes 21-23.

⁶ *General Printing Co. v. Umback* (1935), 100 Ind. App. 285, 195 N. E. 281. This case was for lead poisoning resulting from the negligent operation of the ventilating system. In a scholarly opinion the court recognized the split of authority, but ruled that the case did not come under the Workmen's Compensation Act as the disease was an occupational disease and not a death resulting from an injury by accident.

⁷ *Jacque v. Locke Insulator Corp.* (1934), 70 F. (2d) 680, cert. den. 293 U. S. 585; *Jellico Coal Co. v. Adkins* (1923), 197 Ky. 684, 247 S. W. 972;

denying a recovery at common law are based on the dubious reasoning that a "safe" place to work does not necessarily mean a "sanitary" place, coupled with the dictum that occupational diseases were unknown to the common law,⁸ or in the theory that workmen's compensation acts exclude remedies not granted therein.⁹

The standard of due care has been held to mean only a compliance with the general standards of the industry,¹⁰ though some courts also impose a duty to warn on grounds of the master's superior knowledge.¹¹ The defenses of assumption of risk and contributory negligence would be an additional bar to recovery at common law except in the jurisdictions where the defenses are abolished by statute.¹² The statute of limitations is of particular importance in occupational diseases cases. An occupational disease, such as silicosis, does not occur at once but results from long continued exposure.¹³ The statutory period has been held to begin to run from the date of the initial exposure;¹⁴ the better view is that it runs from the date the work ceased.¹⁵

Donnelly v. Minneapolis Mfg. Co. (1924), 161 Minn. 240, 201 N. W. 305; Jones v. Rinehart & D. Co. (1933), 113 W. Va. 414, 160 S. E. 482.

⁸ McCreey v. Libby-Owens-Ford Glass Co. (1936), 363 Ill. 321, 2 N. E. (2d) 290, 105 A. L. R. 75.

In Adams v. Acme White Lead and Coloring Works (1914), 182 Mich. 187, 148 N. W. 485, a suit for lead poisoning under the workmen's compensation act, recovery was denied, with the dictum that there was no recovery at common law, apparently because there were no cases giving it. The dictum of this case has been cited with approval in many subsequent cases. See: Zajuchuck v. Willard Storage Battery Co. (1922), 106 Ohio St. 538, 140 N. E. 405; Ewers v. Buckeye Clay Pot Co. (1928), 29 Ohio App. 396, 163 N. E. 577; Gordon v. Travelers' Ins. Co. (Tex. Civ. App. 1926), 287 S. W. 911.

⁹ Webb v. Tubize-Chatillon Corp. (1932), 45 Ga. App. 744, 165 S. E. 775; Mabley & Carew Co. v. Lea (1934), 129 Ohio St. 69, 193 N. E. 745. That this doctrine is in disfavor, see Jellico Coal Co. v. Adkins (1923), 197 Ky. 684, 690, 247 S. W. 972, 975; Jones v. Rinehart & D. Co. (1933), 113 W. Va. 414, 425, 169 S. E. 487.

¹⁰ Thompson v. United Lab. Co. (1915), 221 Mass. 276, 108 N. E. 1042; Allen Gravel Co. v. Curtis (1935), 173 Miss. 416, 161 So. 670 (which held the master was bound to know scientific facts showing the risk that would not be known to the uneducated worker).

¹¹ Penn. Pulverizing Co. v. Butler (1932), 61 F. (2d) 311, where liability was denied as there had been a compliance with all precautionary and safety devices as used in the industry generally.

¹² The Indiana Employer's Liability Act, Acts of 1911, c. 88, p. 145, Burns' Ind. Stat. 1933, sec. 40-1101—40-1114, was sufficient to abolish the common law defenses in a suit at law for an occupational disease although it is not an express abolition in every case. See General Printing Co. v. Umback (1935), 100 Ind. App. 285, 195 N. E. 281. Cf. Pa. Gen. Stat. (Purdon 1936), Tit. 77, sec. 41.

¹³ See Sayers and Jones, *op. cit. supra* note 3, p. 9, 13-20. Cf. the Indiana Occupational Diseases Act (sec. 5e), extending the exposure period to three years for silicosis or asbestosis and N. C. Pub. Laws (1935), c. 123, sec. 1(g). In Peru Plow and Wheel Co. v. Industrial Comm. (1924), 311 Ill. 216, 142 N. E. 546, a workmen's compensation case, the court stated, "Occupational diseases are not covered by the compensation act, although not all diseases are to be excluded from the purview of the compensation law. An occupational disease is a diseased condition arising gradually from the character of the work in which the employee is engaged. It does not occur suddenly, but is a matter of slow development. An occupational disease is not an accident."

¹⁴ Schmidt v. Merchant's Dispatch Co. (1936), 270 N. Y. 287, 200 N. E. 824.

¹⁵ Grant v. Fisher Flouring (1935), 181 Wash. 576, 44 P. (2d) 193.

Massachusetts is the only state holding that occupational diseases are within the meaning of "injury" in the workmen's compensation act, although some statutes compensate expressly for injuries or diseases.¹⁶ Most states exclude silicosis from their workmen's compensation laws on the theory that occupational diseases are not an injury by accident or a traumatic injury.¹⁷ Diseases that arise abruptly are sometimes held compensable as accidents though an occupational disease act exists.¹⁸

The need for adequate protection for the victims of occupational diseases led to the amendment of the workmen's compensation acts in some states and to the passage of separate occupational diseases laws in others.

The Indiana Occupational Diseases Act: Three types of coverage have been employed in occupational diseases legislation: (1) a general coverage including injuries and diseases,¹⁹ (2) a limited coverage compensating only for those diseases listed in a schedule,²⁰ and (3) a broad statute covering all occupational diseases.²¹ The Indiana act is of the last type. The possibility that a general coverage statute might become perverted into a form of health and sickness insurance has led to widespread adoption of the scheduled coverage, offering

¹⁶ The Mass. act compensated only for "personal injury" only. In *re Hurlé* (1914), 217 Mass. 223, 104 N. E. 336 awarded compensation for optic neuritis induced by poisonous coal tar gases. See also *Sullivan's Case* (1929), 265 Mass. 497, 164 N. E. 457 containing a similar holding that "personal injury" was broad enough to cover occupational diseases. *Cf.* the following cases, where, although the claimant contracted what is usually regarded as an occupational disease, the courts held it was in fact an accident and therefore compensable: *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276; *Standard Cabinet Co. v. Landgrave* (1921), 76 Ind. App. 593, 132 N. E. 661. *Victory Sparkler and Specialty Co. v. Francks* (1925), 147 Md. 368, 128 A. 635, 44 A. L. R. 363, a case at common law for phosphorus poisoning, and the court held it was not an occupational disease, but an accidental injury, and therefore under the workmen's compensation law. See notes 21-23, *supra*, for a list of statutes compensating for injury or disease.

¹⁷ *General Printing Co. v. Umbach* (1935), 100 Ind. App. 285, 195 N. E. 281, 284. (In Indiana "accident" is defined as "an unlooked for mishap, an untoward event which is not expected or designed," *General, etc., Corp. v. Weirick* (1916), 77 Ind. App. 242, 245, 133 N. E. 391, 392); *Miller v. Amer. Steel & Wire Co.* (1916), 90 Conn. 349, 97 A. 345; *Renkel v. Industrial Comm.* (1923), 109 Ohio St. 152, 147 N. E. 834.

¹⁸ *Ramsay v. Sullivan Mining Co.* (1931), 51 Idaho 366, 6 P. (2d) 856; *Lurye v. Stern Bros. Dept. Store* (1937), 275 N. Y. 182, 9 N. E. (2d) 828; *Vaughan & Rush v. Stump* (1932), 156 Okla. 125, 9 P. (2d) 764.

¹⁹ Calif. Gen. Law (Deering 1931) 4749, p. 2276; Mass. Gen. Law (1932), c. 152, sec. 26; Mo. Rev. Stat. (1929), c. 28, art. 1, sec. 3305, as amended, Acts 1937, p. 382; N. Y. Consol. Laws (Cahill 1931-35 Supp.), c. 66, sec. 3 (2); N. D. Laws 1935, c. 286, sec. 1; Wis. Stat. 1933, sec. 102.01; 33 U. S. C. A. sec. 902, (44 Stat. 1424 (1927)).

²⁰ Dela. Acts 1937, c. 241, p. 716; Mich. Acts 1937, c. 61, p. 77; Ky Stat. (Carroll-Baldwin 1936), sec. 4880; Minn. Stat. (Mason 1927), sec. 4327(9); Neb. Acts 1937, c. 107, p. 367; N. J. Laws 1937, Title 34, c. 15, art. 30-35; N. Y. Consol. Law (Cahill 1931), c. 66, sec. 3; N. C. Pub. Law (1935), c. 123, sec. 1(b); Ohio Gen. Code (Page Supp. 1935), sec. 1465-68a; Penn. Acts 1937, c. 552, p. 2714; R. I. Laws 1936, c. 2358, sec. 2; Wash. Acts 1937, c. 212, p. 1031; W. Va. Acts 1935, c. 79, sec. 5.

²¹ Conn. Gen. Stat. (1930), sec. 5226; Ill. Laws 1935-36, 3rd Spec. Sess., p. 40 (Ill. Rev. Stat. 1937, c. 48, sec. 172.1-172.35); Indiana Acts 1937, c. 69, p. 334.

advantages in case of administration and proof.²² A disease not included in the schedule would not be compensable, and new types of occupational diseases are being found each year. For this reason a broad general coverage is fairest to the workman and more desirable.²³ Judicious administration is necessary in any type statute to prevent abuses.

The Indiana act provides (§§ 4a, 4d) for an election to come under the statute. This election is extended to all employers and to the employees already employed at the time the act took effect. The Workmen's Compensation Act presumes the employer has accepted the provisions unless there is an election to the contrary,²⁴ but the result should be the same in the final analysis, as employers not coming under either act lose the common law defenses. The Occupational Diseases Act offers additional advantages to the employer in lowered costs and a speedy adjudication of all claims by an administrative tribunal.²⁵

Employees who have contracted silicosis but were not disabled prior to the effective date of the act raise the question of accrued liability. Medical authorities recognize three stages of silicosis; only in the third stage does the impairment become acute and prevent the employe from continuing his normal occupation.²⁶ Special treatment of the problem was necessary to prevent widespread discharge of these workers. The Indiana act (§§ 5e, 26) limits compensation to cases of disablement when the last exposure to the hazards of the disease occurred on or after the effective date of the statute, June 7, 1937. An employee is conclusively deemed to have been exposed when he is employed in an occupation or process in which the hazard of an occupational disease exists. The employer liable is the one in whose employment the employee was last exposed, regardless of the length of time of the exposure. In the case of silicosis or asbestosis the only employer liable is the last employer in whose employment the employee was last exposed during a period of sixty days or more after the effective date, and an exposure of less than sixty days after the effective date is not deemed a last exposure. Compensation has been denied under the terms of this section in the case of *In re Jeffries*,²⁷ the only Indiana

²² Andrews, *Compensate All Occupational Diseases* (1927), 17 Am. Labor Leg. Rev. 261; an editorial in 18 Am. Labor Leg. Rev. 374 (1928).

²³ "The contention is made that this paragraph 28 extends the Workmen's Compensation Law so as to make it applicable to any accident arising out of and in the course of the employment. This in substance would make workmen's compensation the equivalent of life and health insurance," *Goldberg v. 954 Marcy Corp.* (1938), 276 N. Y. 313, 12 N. E. (2d) 311.

²⁴ Indiana Workmen's Compensation Act of 1929, sec. 10. Indiana Workmen's Occupational Diseases Act, sec. 3a.

²⁵ The lowered cost of an election to come under the terms of the act is shown by the fact that an action for damages may be as high as \$10,000 (sec. 3a), while the maximum that may be paid as compensation under the statute is \$5,000 (sec. 11a).

²⁶ Sayers and Jones, *op. cit. supra* note 3, p. 18, 19, "The individual's capacity for work becomes seriously impaired . . . (in the third stage)".

²⁷ (Ind. App. 1938), 14 N. E. (2d) 751. "We conclude further that, by virtue of the terms of sec. 32 of the act, no employer would be liable for compensation in any case of silicosis in which the disablement on which the claim is predicated, occurred prior to the effective date of the act. So an exposure to the hazards of silicosis previous to the effective date of the act could not be taken into consideration in determining the last employer in

case construing the act, as the period of exposure was less than sixty days. A recent Illinois case construing the comparable section of the Illinois act, from which the Indiana act was copied, held this section to limit the definition of "last employment" and not that of "exposure"; "sixty days" was held to mean a single sixty day period and not sixty working days.²⁸ Having thus limited the act to a definite employer to prevent wholesale discharging of employees, the Indiana act (§ 24) allows a waiver of full compensation by any employee who had contracted silicosis or asbestosis prior to the effective date but was not disabled. Notice of the waiver had to be given to the Industrial Board within sixty days after the statute became effective, and it was subject to the approval of the Board. These provisions did not completely solve the problem of accrued liability but were probably sufficient to enable the employee to retain his job. As two years have passed since the act took effect, this question is losing importance.

Lump sum payments are allowed when in the best interests of the parties, although in cases of complete disability petition for commutation of the award to a lump sum may not be made for six months. The act denies a review of an award when the Board orders it paid in a lump sum (§20i), although all other awards may be modified because of a change in conditions. In cases of partial disability the acceptance of a lump sum would work a hardship on the employee whose disability later became complete. Cautious administration is necessary to prevent abuses of this provision.

Many limitations are placed on recovery even though a disease may be proved to exist. Cases which may be compensated under the Workmen's Compensation Act are not recoverable under the Occupational Diseases Act (§20 L), although provision is made for the amendment of claims erroneously filed. Compensation is denied for diseases or death intentionally self-inflicted, or due to intoxication, during the commission of a felony or misdemeanor, or wilful failure to use safety devices or obey written rules posted, or refusal to perform a statutory duty (§§14a, 14b). The harshness of these provisions calls for the cooperation of the employer in safety measures, as supplying safety masks, free medical examinations and shifting from one type of work to another to lessen exposure. The cost of cooperation would pay in the form of reduced insurance costs.

ELEMENTS OF LIABILITY UNDER THE INDIANA ACT: Although the Indiana act offers a broad coverage for all occupational diseases, many important elements come into consideration in order for liability to attach.

(1) No compensation is payable unless disablement occurs within one year from the last day of the last exposure to the hazards of the disease, except in cases of silicosis or asbestosis, in which cases disablement must occur within

whose employment the employee was last exposed to the hazards of the disease, during a period of sixty days, or more, after the effective date of the act."

²⁸ *Morris Metal Products Co. v. Industrial Comm.* (1939), 370 Ill. 292, 18 N. E. (2d) 899. The dictum is interesting, "If after such period of sixty days or more the employee enters another employment, the first employer remains liable until the employee has been exposed, as defined in the act during a period of sixty days with the second employer, when the latter under the statute becomes the 'last employer'."

three years (§5e). This section raises the problem of what is a "disablement" and when, where, and what is an "exposure" to the hazards of an occupational disease. "Disablement" is defined (§5d) as the event of becoming disabled from earning full wages in the work in which the employee was last engaged when last exposed to the hazards of an occupational disease by the employer from whom he claims compensation. The employee is conclusively deemed (§26) to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation in which the hazard of an occupational disease exists. Dr. Sayers lists 33 uses of silica in industry,²⁹ and presumably there is a hazard of silicosis in each of these uses. The industries in which a silicosis hazard occurs are well known because of the vast amount of research done in the field, but in the case of other occupational diseases extensive litigation may be necessary before the presence of an occupational disease hazard is recognized in some industries.

(2) This raises the question of what is an occupational disease. The definition of the statute (§6a) defines it as "a disease arising out of and in the course of the employment."³⁰ Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of the occupational disease." The section (§6b) continues, "A disease shall be deemed to arise out of the employment, only if there is apparent to the rational mind, upon consideration of all the circumstances, a direct causal connection³¹ between the conditions under which the work is to be performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause,³² and which does not

²⁹ Sayers and Jones, *op. cit. supra* note 3, p. 3, 4, 5. The chief industries with a definite silicosis hazard are sandblasting, metal grinding and polishing, foundry work, glass and asbestos manufacturing, and rock drilling.

³⁰ "Arising out of and in the course of the employment" should be given an interpretation similar to that given the phrase under the Workmen's Compensation Act. See definition used in *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276, 277.

⁴¹ "Causal connection" has been distinguished from "Proximate cause" as being more remote in the chain of circumstances, *Ala. Power Co. v. Bass* (1928), 218 Ala. 586, 119 So. 625, 628. The question naturally arises whether a "direct causal connection" is not more akin to proximate cause than a mere "Causal connection".

The statutory definition seems to have pulled together all possible explanations used by the courts in workmen's compensation cases. "It 'arises out of the employment' when there is apparent to the rational mind upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury," *In re McNicol* (1913), 215 Mass. 497, 102 N. E. 697. See further, *Causation in Workmen's Compensation* (1937), 13 Ind. L. J. 164.

³² "Proximate cause is defined to be any cause which, in actual and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which the result would not have occurred," *Moran v. Paledor* (1926), 84 Ind. App. 266, 273, 151 N. E. 140.

"The term 'legal cause' is used to denote the fact that the sequence of events through which the actor's tortious act or omission has brought about (in fact caused) the harm which another has sustained is such as to make it just to hold the actor responsible therefor," Harper, *Law of Torts* (1933),

come from a hazard to which the workman would have been equally exposed outside of the employment.³³ The disease must be incidental to the character of the business and not independent of the relation of employer and employee. 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."³⁴ The determination of what is an occupational disease from the statutory definition will involve much litigation in the coming years. Under the Indiana act the problem of causation is thrust squarely into the act, with the qualifying words of the definition apparently to delimit "proximate cause" even more narrowly to the employment. Because the causation factor is so important in the definition, the existence of an occupational disease in one instance will have to be confined to the facts of the individual case and will be of little value in determining what is an occupational disease in subsequent litigation.³⁵

(3) The most interesting change from the usual procedure in compensation legislation is the proof of disability (§8n). "All compensation payments named and provided for in this section shall mean and be defined to be only for such occupational diseases and disabilities therefrom as are proved by competent evidence, of which there are or have been objective symptoms proven, not within the physical or mental control of the employee himself." This section rules out all proof of subjective symptoms,³⁶ but the definition of "objective symptoms" has not been clarified. As X-ray evidence has always been considered indispensable in the diagnosis of silicosis this section should not be a serious limitation on recovery,³⁷ but if there should be some occupational disease, the symptoms of which are not capable of being visualized or palpitated, recovery would be doubtful. This section should be effective in ending fraudulent claims.

(4) As an aid in the proof of an occupational disease hazard the act provides (§20k) for the appointment of an industrial hygienist, engineer, physician or chemist to make a survey of the place of employment and testify as

sec. 110, p. 258. If instead of "the actor's tortious conduct or omission", the phrase, "the physical conditions under which the work is to be performed" is substituted, it is apparent that this part of the definition is merely to tie up the causal connection between the conditions of work and the disease that resulted.

³³ This clause is to remove the possibility that the occupational diseases act might be used as a general health insurance act.

³⁴ While the element of foreseeability has always been used in negligence cases, apparently the legislature has adopted a "foreseeability in retrospect" concept. The question might arise whether this broadens the idea of proximate cause, but the qualifications as to origin and consequence apparently would limit this sentence with the result that the definition would be merely an overstatement of the rules of proximate cause.

³⁵ Bartlett, *What is an Occupational Disease?*, published in the Amer. Bar Assn., Section on Insurance Law, (1938-39), Cleveland meeting, p. 312-328.

³⁶ An application of the rule of statutory construction, "*expressio unius est exclusio alterius*" would give this result. "Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded," Lewis' Sutherland on *Statutory Construction* (1904), sec. 492, p. 919.

³⁷ Hayhurst, *The Diagnosis of Silicosis* (1936), 26 Am. Labor Leg. Rev. 61, 63.

³⁸ Sayers and Jones, *op. cit. supra* note 3, p. 14-16.

to his findings. The expert testimony gained may be of value in determining the Industries in Indiana with the greatest silicosis hazard, as well as the other occupational diseases present. However, different occupations in the same industry have different degrees of exposure to the hazards of silicosis. Studies of the dust concentration show a much higher exposure in certain occupations constituting only a small part of the industry's total man-hours than in other occupations having a close technological relationship.³⁸ Unless a survey be made of each separate occupation under every possible condition the usefulness of this provision will be slight in individual cases.

CONCLUSION: The schedule of awards is similar in form to that of the Workmen's Compensation Act and is not within the scope of this note. Most variations are explained because of the difference in the nature of an occupational disease and an injury.³⁹

The fear of loss of employment has caused labor groups in the dusty industries to oppose compulsory periodic medical examinations.⁴⁰ The Indiana act calls for medical examination only after disablement (§13) which is of no value as a preventive measure. Periodic medical examinations are necessary to determine the effectiveness of the preventive practises of an industry but it will not be a possibility until some form of security of employment is offered along with it.⁴¹

Once a worker contracts silicosis there is no known cure; prevention remains the solution. The mechanical and engineering methods of prevention are effective though distasteful to the workers and costly to the employers.⁴² Affirmative public health acts requiring their use are a natural supplement to the Occupational Diseases Act and would materially reduce silicosis in industry.

B. W.

MORTGAGES—PLACE OF RECORDING—Action to foreclose a mortgage. Defendant, a resident of Allen County, owned two grain elevators located respectively on lands leased from the Baltimore and Ohio Ry. Co. and the Wabash R. Co., in DeKalb and LaGrange Counties. The leases¹ provided that the defendant

³⁹ An inexplicable variation is the limitation of burial expense (sec. 7c) to \$100 in occupational diseases cases, while it is \$150 in the Workmen's Compensation Act (sec. 39).

⁴⁰ Nelson, *Silicosis Problem Solved in Wisconsin* (1936), 26 Am. Labor Leg. Rev. 53, 57.

⁴¹ Sayers and Jones, *op. cit. supra* note 3, p. 27, "Preliminary and periodic physical and roentgenological examination should be made of all employees engaged in industrial processes where there is a potential if not actual exposure to excessive concentrations of silica in the atmosphere."

⁴² Sayers and Jones, *op. cit. supra* note 3, p. 28-30. The use of methods (1) to prevent the escape of the dust into the workroom atmosphere, (2) to remove the dust from the atmosphere, and (3) the use of mechanical personal protective equipment is advocated.

In Science News Letter, Mar. 18, 1939, Vol. 35, p. 163, is an account of the use of aluminum dust inhalations as a preventive of silicosis. The aluminum dust so inhaled dissolves in the body fluids to form colloidal aluminum hydroxide which is then absorbed and firmly held on the silica crystals and renders the dust harmless.

¹ The language of the instrument quoted in the present case seemed to indicate that one of the leases was only a license but the court in its treatment of the case considered both as leases. The writer in his discussion of