Workmen's Compensation: The Cumulative Injury Doctrine

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STUDENT NOTES

WORKMEN'S COMPENSATION: THE CUMULATIVE INJURY DOCTRINE

I. INTRODUCTION

Until 1976, the West Virginia Supreme Court rigidly adhered to the judicially derived rule that to be compensable under the workmen's compensation provisions of the West Virginia Code1 an industrial injury had to arise from an isolated, fortuitous event. This rule resulted in the denial of workmen's compensation claims which failed to allege a particular accident or accidental result as

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1 W. Va. Code § 23-4-1 (1978 Replacement Vol.), which reads in relevant part:

... the commissioner shall disburse the workmen's compensation fund to the employees of employers subject to this chapter, which employees have received personal injuries in the course of and resulting from their covered employment or to the dependents, if any, of such employees in case death has ensued, according to the provisions hereinafter made; and also for the expenses of the administration of this chapter, as provided in section two [§ 23-1-2], article one of this chapter. ... 

For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be deemed to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment, (5) that it is incidental to the character of the business and not independent of the relation of employer and employee, and (6) that it 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, though it need not have been foreseen or expected before its contraction.

No award shall be made under the provisions of this chapter for any occupational disease contracted prior to the first day of July, one thousand nine hundred forty-nine. An employee shall be deemed to have contracted an occupational disease within the meaning of this paragraph if the disease or condition has developed to such an extent that it can be diagnosed as an occupational disease. ...
the event producing injury. In 1976, however, the court, in Lilly v. Workmen's Compensation Commissioner, made a significant move away from the injury-by-accident rule by accepting as compensable a concept of industrial injury known as cumulative injury. Cumulative injury, as the term implies, takes as its premise the hypothesis that a series of microtraumatic injuries can be just as debilitating, when added together, as an injury caused by an isolated, fortuitous accident.

The development in West Virginia of the concept of cumulative injury as a compensable injury was made possible by the liberal coverage provisions of the West Virginia Code, which includes, within the definition of personal injury, occupational diseases causally related to employment. If a disability or disease can meet all six tests for occupational diseases as set out in the basic coverage provision, it is considered compensable as a personal injury. The court in Lilly seized upon the occupational disease criteria to effect a change in the injury-by-accident test for compensability without overtly disturbing years of case law based upon that test.

Lilly involved an employee whose regular duties required the sewing of garments which were put into 25-pound bundles. The lifting of these bundles, coupled with a twisting motion of the employee's body from four to ten times an hour over a seven-month period, resulted in lower back pain which prohibited the employee from continuing the job. The court found that the employee's injuries satisfied the occupational disease requirements of the West Virginia Code and therefore were compensable as a personal injury. In language characteristic of cumulative injury holdings in other jurisdictions, the court held that an "employee who is injured gradually by reasons of the duties of employment ... is no less the recipient of a personal injury than one who suffers a single disabling trauma." Because this premise constitutes a significant departure from decisions based upon the injury-by-accident test, the implications for the compensation system are vast. In addition

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4 Cumulative injuries are referred to in 1B Larson, WORKMAN'S COMPENSATION LAW § 39.00 (7th ed. 1978) [hereinafter cited as Larson], under the heading "Gradual Injury."
6 Id.
7 225 S.E.2d at 215.
8 Id. at 217.
9 Id. at 218.
to cumulative injury, other injuries previously considered noncompensable under the old test, such as certain types of psychological disabilities, may attain a compensable status under the Lilly holding. The major implications of Lilly are best examined by a comparison of the principles of cumulative injury with the origin and purpose of the injury-by-accident rule which Lilly impliedly overrules.

II. HISTORY OF THE INJURY-BY-ACCIDENT RULE

The West Virginia Workmen's Compensation Act,10 like most other compensation acts of its generation, was inspired by the English Compensation Law of 1897,11 which required an injury by accident.12 The injury-by-accident requirement in the English act was primarily a response to the replacement of common law tort remedies with workmen's compensation provisions. The latter required no showing of negligence before recovery would lie.13 As the new workmen's compensation system was not designed to promote strict liability14 of employers, however, its substitution for negligence necessitated the development of some type of work connection test that would replace proximate cause15 but still limit recovery in some instances. While not intended to be as limiting as the proximate cause test, the injury-by-accident test did effectively limit compensability to those injuries which could readily be connected to employment.16 Since occupational diseases were never contemplated as compensable under the English act17 (most probably because their prevalence was little recognized at common law), the requirement of injury by accident posed no inherent conflicts when used as a work connection test.18 Thus, the new workmen's compensation system effectively eliminated the uncertainties of tort litigation and the proximate cause test and substantially broadened employers' liability for industrial accidents19 while still

11 1 Q. B. c. 37 § 1 (1897).
13 1 Larson, supra note 4, § 1.20.
14 Id. § 2.20.
15 Id. § 2.10.
16 Id.
17 1B Larson, supra note 4, § 41.20.
18 For a discussion of the work connection test see 1A Larson, supra note 4, § 20.00.
19 1 Larson, supra note 4, § 2.10.
somewhat limiting the scope of compensable injuries through the workings of the injury-by-accident rule.

The various state adoptions of workmen's compensation laws required the courts to interpret the legislative intent as to the injury-by-accident rule in various coverage provisions. While the enactments in some states spoke directly to the requirement of injury by accident,20 others did not, and the courts were necessarily left with the choice of whether or not to apply this doctrine. West Virginia, as Professor Larson notes, is one of a handful of jurisdictions whose basic coverage provisions contain no reference to the requirement of injury by accident.21 Other jurisdictions, most notably Ohio,22 Michigan,23 and Massachusetts,24 when first faced with the problem of interpreting coverage provisions similar to West Virginia's, took varying approaches. The courts in Michigan and Ohio chose to "read in" the requirement of injury by accident from other sections of the act.25 The Massachusetts court, however, held that the legislature intentionally chose not to include the injury-by-accident rule, taking into account the obvious fact that the legislature had had a copy of the English act before it when drafting the provision.26 The effect of this Massachusetts holding was to allow compensation for occupational diseases and injuries when the disease or injury arose out of and in the course of employment.27

The West Virginia court, along with many others, did not utilize the same reasoning as the Massachusetts court. The result was that the West Virginia court gave birth to the requirement of

20 1B Larson, supra note 4, § 37.10.
21 Id.
25 Both Brown and Adams are illustrative of the rather draconian interpretation given to the coverage provisions. The court in Brown justified its reading in of the injury-by-accident requirement by noting that if occupational diseases were compensable, insurance rates would soar. The Michigan court noted that since occupational diseases were not compensable at common law, they should not be compensable under the act. This clearly ignores the principle that workmen's compensation is designed to remove common law tort concepts from the workplace. While the Michigan court has since redeemed itself, in Sheppard v. Michigan Nat'l Bank, 348 Mich. 577, 83 N.W.2d 614 (1957), the Ohio court maintained the injury-by-accident test in Bowman v. Nat'l Graphics Corp., 55 Ohio St. 2d 222, 378 N.E.2d 1056 (1978).
27 Id. at 495, 111 N.E. at 383.
injury-by-accident as a work connection test designed to limit the types of compensable injuries.\textsuperscript{23}

This appears to be the posture maintained in the court's 1933 decision of \textit{Jones v. Rinehart & Dennis Co.}\textsuperscript{29} \textit{Jones} held that an employee could not recover under workmen's compensation for silicosis unless he could prove that his disability resulted from an isolated, specific event.\textsuperscript{29} The court did hold that the claimant could recover at common law if he could prove that his disability resulted from the employer's negligence.\textsuperscript{31} As Larson notes, however, the concept of negligence as it related to occupational disease at the time of the \textit{Jones} decision was premised primarily on the difference between "normal conditions of the industry as distinguished from the negligence of the employer."\textsuperscript{32} In other words, it was generally not considered negligent to allow an employee to work in an unhealthy environment if this environment was a normal condition of the industry.\textsuperscript{33} The following quote from \textit{Jones} is illustrative:

\begin{quote}
[S]uch [common law] right of action does not exist in the employee merely because he has contracted disease as an incident of his employment, in the absence of a showing of negligence on the part of his employer, because such disease may arise in spite of due care of the employer to prevent its being contracted by the employee. In such circumstances it becomes a risk of employment. . . .\textsuperscript{34}
\end{quote}

\textsuperscript{23} Martin v. Compensation Comm'r, 107 W. Va. 583, 149 S.E. 824 (1929). Although Archibald v. Compensation Comm'r, 77 W. Va. 448, 87 S.E. 791 (1919), is often cited as the case adopting the injury-by-accident rule, a closer reading of the case seems to indicate that the court never intended to embrace the rule. In \textit{Archibald}, the term "accident" is merely used to describe the event leading to the claimant's death and, in this respect, is employed for semantic convenience rather than doctrinal development. The court goes to great lengths to discuss the exclusionary provision of the compensation act, and in so doing, notes that the rules of statutory construction prohibit courts from reading in exclusions where the legislature has already spoken. As West Virginia's basic coverage provisions do not require an injury by accident, yet set out other exclusions, it appears improbable that the court would violate its own sanctions by reading in an exclusionary device such as injury by accident.

\textsuperscript{29} 113 W. Va. 414, 168 S.E. 482 (1933).

\textsuperscript{30} \textit{Id.} at 423, 168 S.E. at 486.


\textsuperscript{32} 1B LARSON, supra note 4, § 41.20.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} 113 W. Va. 414, 419, 168 S.E. 482, 485 (1933).
There is some difficulty in aligning this reasoning with the purposes of workmen's compensation. To recover in workmen's compensation for a traumatic injury, the employee need not show that he acted with due care. 34 In fact, his negligent acts may be the sole cause of his injury, and the employer may have taken every possible precaution to prevent the injury. Nonetheless, the employer must compensate the employee if the injury is sustained in the course of and resulting from employment. 35 The court's requirement in Jones that the employee go beyond workmen's compensation standards and prove negligence to recover for occupational diseases arising out of employment creates an artificial distinction based on the nature of the injury rather than its causative factors. Thus, in the case of a traumatic injury, the employer's due care is irrelevant. Yet in the case of an occupational disease it is the central dispute, even though both the traumatic injury and the occupational disease arose out of and in the course of employment. The distinction appears to have been motivated by the desire to limit the types of injuries considered compensable and, as Larson suggests, prompted by economic considerations. Not the least of these economic considerations was the reaction of insurers upon discovering how widespread certain occupational diseases were in some industries. 36

The practical result of this artificial distinction was to preclude recovery in those instances when the employee could not point to an isolated, fortuitous event as the cause of his disability. Such was the case in the decision of Cashman v. Sims. 38 Cashman was a physician employed at a tuberculosis sanitarium. Just prior to his employment, he received a physical examination which revealed no signs of the existence of tubercular bacilli. During his employment, he contracted tuberculosis and sought recovery from workmen's compensation as well as through a special legislative enactment. 39 The court held that a disease must be attributable to a specific and definite event arising in the course of and resulting from employment and that a disease contracted over a period of time was not compensable. 40 Had Cashman been able to establish that the disease was transmitted by a particular patient at a par-

33 1 Larson, supra note 4, § 2.10.
35 1B Larson, supra note 4, § 41.20.
36 130 W. Va. 430, 43 S.E.2d 805 (1947).
38 130 W. Va. 430, 446, 43 S.E.2d 805, 816 (1947).
ticular time, he most probably would have recovered. The test in Cashman was not related to the cause of the disease or its point of origin. Rather, it was based on a concept of time and event that precluded recovery, as the court noted, by a most deserving claimant.

The injury-by-accident requirement has been modified in most jurisdictions to include situations where the event producing the injury is not accidental or fortuitous but the result is. The West Virginia court followed this newer accidental result rule in Pennington v. Workmen's Compensation Commissioner. In Pennington, the court held that although the claimant was performing his normal duties of shoveling coal when he felt back pain and that there was no accident in the traditional sense of the word, the occurrence of pain at a given point in time satisfied the isolated, fortuitous occurrence test for compensability.

Under either test, injury-by-accident or accident by result, the determinative factor is the ability of the employee to isolate some event upon which to rest his claim. The extent to which some claimants have gone to establish a point in time upon which to rest their claims often borders on the extreme. In Jordan v. Workman's Compensation Commissioner, a claimant with a pre-existing back disability attempted to establish that his disability was aggravated by his employment. To fit within the injury-by-accident test or the accidental result test, the claimant alleged three different versions of his "accident." The supreme court affirmed a finding by the Workmen's Compensation Appeals Board that the claimant's allegations were contradictory and that he had failed to sustain his burden of proof. While the facts of Jordan are not particularly compelling for compensation, the case does indicate an awareness by the claimant's attorney that it was necessary to allege an event upon which to rest his claim. The court in Lilly impliedly recognized this problem when it noted that the claimant was told by her doctor's nurse that she would have to indicate a

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41 1B Larson, supra note 4, § 38.20.
42 222 S.E.2d 579 (1976). Although Pennington can be regarded as dealing a strong blow to the injury-by-accident rule, its accidental result analysis indicates that the court had still not freed itself from the constraints of an events related test.
43 Id. at 582.
45 Id. at 161, 191 S.E.2d at 499.
46 Id. at 167, 191 S.E.2d at 502.
specific date of injury if her claim for compensation were to be successful.\(^7\)

III. *Lilly v. Workmen's Compensation Commissioner*

The *Lilly* case brought to the court's attention in a very clear way many of the problems inherent in employing a work connection test based upon the injury-by-accident rule or the accidental result rule. The court in *Lilly* was faced with an injury which, according to medical evaluation, arose out of and in the course of employment. The nature of the injury, however, did not lend itself to an analysis for compensability based on either the injury-by-accident test or the accidental result test. The claimant's back problems arose gradually from repeated microtraumatic occurrences impossible to consider as arising out of an isolated event. Additionally, the manifestation of the disability was not so sudden as to satisfy the accidental result test. Under either of these judicially derived tests, the employee's claim for compensation would have to fail, although the medical evidence pointed to employment as the causative element.\(^8\) Confronted with such a fact situation, the court could not, in justice to the employee and the compensation system, deny the claim. To accept the claim as satisfying one of the accidental event tests would have required the court to create a legal fiction which would have added greatly to the confusion already surrounding the accidental event tests. The only remaining approach the court could take was to evaluate the claim under the occupational disease provision of the West Virginia Code.\(^9\) Claimant's counsel, upon realizing that he could not support the claim under either test, requested the appeals board to consider the claim as an occupational disease, but the board ignored the request and denied the claim. The board's refusal to consider this approach to the claim constituted the grounds for appeal.\(^10\) Noting that the compensability of a back injury as an occupational disease was a question novel to this jurisdiction, the court analyzed the claim under the six basic requirements for occupational diseases and held that:

> [T]he back injury suffered by the claimant . . . occurred in the course of and as a result of her employment; that there is a

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\(^7\) 225 S.E.2d 214, 215 (W. Va. 1976).

\(^8\) *Id.* at 216.


\(^10\) 225 S.E.2d at 215.
direct causal connection between the conditions under which her work was performed and the occupational disease; that her back condition can be seen to have followed as a natural incident of her work; and that it can be fairly traced to the employment as the proximate cause. To hold otherwise would operate to defeat certain valid claims merely because there was no ascertainable, single, isolated fortuitous event which caused the injury.51

This clear and unequivocal rejection of the isolated fortuitous event tests allowed the court to serve the ends of the compensation system without impairing its own credibility by resorting to a strained construction of the old tests to find the claim compensable.52 In support of its novel construction of the occupational disease provisions of the state code,53 the court relied on a California case, *Fruehauf v. Workmen's Compensation Appeals Board*,54 which also held that a series of microtraumatic injuries to an employee's back which resulted in disability constituted an occupational disease within the provision of that state's code.55 Importantly, the California court noted that the injury would not have been compensable as a personal injury under the statute.56 The court in *Lilly* also found support in *Montgomery v. State Compensation Commissioner*,57 a 1935 case holding that one who has suffered shock, exhaustion, and other conditions not of a traumatic origin but rather resulting from being lost in a mine for seven days has received a personal injury,58 compensable under the West Virginia Code.59

Jurisdictions other than California have also considered the theory of cumulative injury. A 1951 Michigan case,60 which the

51 Id. at 217-18.
52 One device used by some courts to get around the constraints of the injury-by-accident rule is the "repeated impact" theory. 1B Larson, *supra* note 4, § 39.40. The theory, however, seems to elevate form over substance. Each impact is treated as an accident for purposes of the rule. As each impact alone creates no perceptible deterioration, each impact individually would not result in compensability. It is only in their cumulative effect (hence the term cumulative injury) that these impacts may be compensated.
56 68 Cal. 2d at 572, 440 P.2d at 238, 68 Cal. Rptr. at 166.
58 Id.
California court and the West Virginia court recognized as persuasive, held that a repeated series of strains associated with employment was compensable as an occupational disease. However, only a few months previous to that decision, the Michigan court had held that repeated strains associated with employment were non-compensable.61

Although most jurisdictions confronting the compensability of cumulative injury claims have reached a remarkable variety of stances on the issue, those which have ruled in the affirmative faced and will continue to face a more refined question. The question, as Larson notes, is no longer one based upon the difference between occupational disease versus accidental injury, because compensability lies on both sides of that line. Rather, the problem under most tests is "separating occupational disease from diseases that are neither accidental or occupational but common to mankind and not distinctively associated with employment."62 This problem has arisen in West Virginia, as the case of Myers v. Workmen's Compensation Commissioner43 suggests. In Myers, a 59-year-old claimant sustained a hearing loss as a result of 30 years' experience in the underground mining business. The appeals board, in reversing a finding of compensability by the commissioner, accepted the evidence presented by the employer, which indicated that "the most common cause of this type of hearing loss is degeneration from advancing years."64 The supreme court, in reversing the finding of the appeals board, held that the claimant did not have to "prove the exclusion of all else, the causal connection between the injury and the employment."65 The evidence presented by the claimant set forth the fact that he had been exposed to loud noises from such mining tools as roof bolters and dynamite shooters and that he had suffered a medically documentable hearing loss which was of the type normally found in workers exposed to excessive industrial noise. The liberal construction rule for workmen's compensation is, of course, operative in West Virginia and was applied in the Myers case to "give the claimant the benefit of all reasonable inferences."66

62 1B Larson, supra note 4, § 41.32.
64 Id. at 125.
65 Id. at 127.
66 Id. at 126.
IV. What Next?

Although Lilly provided the court with an excellent opportunity to employ the occupational disease provisions to support a cumulative injury claim, the interpretation of those provisions to support other types of injuries not historically compensable is a subject ripe for speculation. Perhaps the most controversial area concerns claims based on mental and nervous injuries. Larson suggests that these types of injuries can be delineated into three categories: (1) mental stimulus causing physical injury; (2) physical trauma causing nervous injury; and (3) mental stimulus causing nervous injury. 67

Cases involving mentally stimulated physical injury have generally been considered compensable by a majority of jurisdictions. 68 The easiest cases usually involve a sudden event such as a scare, a loud noise, or a near-accident which results in a direct physical impairment. 69 In these situations, the event is fortuitous, and the result is certain; thus the elements of the old tests are satisfied. However, a more difficult situation arises when the events leading up to the physical injury occur over a protracted period of time. Under the injury-by-accident test, compensability would be denied. Under the test of injury by accidental result, compensability would probably lie if the disability occurred at an ascertainable time and can be linked to employment. Thus, in the much cited case of Klimas v. Trans-Caribbean Airways, Inc., 70 compensation was awarded to the dependents of an executive who, under extreme pressure to meet a project deadline, suffered a fatal heart attack upon learning that the cost of the project exceeded his budget and the deadline could not be met.

Cases falling in the second category, physical injury causing nervous injury, are usually compensable to the extent of the physical disability and the resulting neurosis. 71 Under the injury-by-accident test, the requirements of an isolated, fortuitous event are satisfied by the initial physical trauma, and it is only a matter of

68 Id. at 1244.
69 Id. at 1245.
71 Larson, Mental and Nervous Injury in Workmen's Compensation, 23 Vand. L. Rev. 1243.
extending the recovery to the resulting neurosis. The West Virginia Supreme Court of Appeals, when confronted with a claimant alleging a nervous injury as the result of a physical injury, has allowed compensation for both the physical injury and the resulting neurosis. In Bare v. Workmen's Compensation Commissioner, the court allowed the claimant to recover permanent total disability benefits for the effects of a physical disability caused by a slate fall and the resulting nervous injury. Judge Haymond, writing for the court, held:

Upon the undisputed evidence that the mental and emotional condition of the claimant amount to total permanent disability and that such condition resulted from the injuries sustained by the claimant . . . the commissioner was fully justified in considering the mental and emotional condition of the claimant in granting the claimant a total permanent disability award.

The court approved the method of extending the recovery to include the resulting mental disability when the origin of the combined disabilities could be traced to an isolated, fortuitous occurrence.

In Sisk v. Workmen's Compensation Commissioner, the court, confronted with facts similar to Bare, granted a total permanent disability award to a claimant who was struck on the head by a piece of slate and suffered a mental as well as a physical disability. Again, the court applied the same principle of extending the recovery to include the mental disability when the mental disability was precipitated by a physical trauma. The principle was also applied in Ward v. Workmen's Compensation Commissioner and Harper v. Workmen's Compensation Commissioner. In both Ward and Harper, an initial physical trauma precipitated the mental disability, making the claims compensable.

According to Larson, there is almost no limit to the variety of disabling mental conditions which have been deemed compensable. In one case, the claimant was bitten by a cat and developed a psychoneurotic fear of rabies for which he was compensated. It

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72 148 W. Va. at 768, 137 S.E.2d at 440.
75 234 S.E.2d 779 (W. Va. 1977).
76 1B Larson, supra note 4, § 42.22.
77 Kalikoff v. Lucas & Co., 271 App. Div. 942, 67 N.Y.S.2d 153 (1947); aff'd,
appears, then, that even under the restrictive injury-by-accident or accident-by-result tests, compensability will lie in cases involving mental stimulus resulting in an ascertainable physical disability and in cases when a physical trauma results in a mental disability. In both of these circumstances, the event tests are satisfied by either the accident, the result, or both.

The more difficult cases, however, and the ones in which the Lilly definition of occupational disease and personal injury may have the greatest impact, are those cases in Larson's third category—mental stimulus resulting in a nervous disability. A 1960 Michigan decision, Carter v. General Motors Corp.,79 involved an assembly line worker who could not keep up with the line and was subjected to repeated criticism from his foreman. Although the claimant was diagnosed as being susceptible to paranoid schizophrenia (he repeatedly went AWOL while in the Army), the court found that "[t]he case at bar involves a series of mental stimuli or events [the pressure of his job and the pressure of his foreman] which caused an injury or disability . . . [and that] Carter's disabling psychosis resulted from emotional pressures encountered by him daily in his work."80 Interestingly, the Michigan court, when surveying other jurisdictions, cited with approval the West Virginia case of Montgomery v. Workmen's Compensation Commissioner,81 which held that an employee who suffered shock and exhaustion as a result of being lost in a mine for seven days was entitled to compensation. The Michigan court in Carter cited Montgomery for the proposition that shock and exhaustion, although injuries related to the nervous system, were compensable even without a finding of a physical trauma.82 The Montgomery case was also cited in Lilly but for a different purpose. The court in Lilly cited Montgomery to support the proposition that an injury does not have to be related to an isolated, fortuitous event.83 Although the court in Montgomery did state that the seven days lost in the mine constituted a specific event,84 the Montgomery holding is more properly explained by the Lilly interpretation. The Montgomery rationale was an attempt by the court to remain con-

297 N.Y. 663, 76 N.E.2d 324 (1947).
80 361 Mich. at 593, 106 N.W.2d at 113.
82 361 Mich. at 588, 106 N.W.2d at 110.
sistent with the injury-by-accident test in the face of a fact situation which could not reasonably be categorized as a specific, isolated event. The *Lilly* decision properly addressed what the *Montgomery* court presumed in its holding but failed to state boldly—the proposition that injuries can take place over a period of time.

This proposition, as stated in *Lilly*, coupled with the Michigan court's interpretation that *Montgomery* stands as authority for the compensability of nervous disorders not precipitated by a physical trauma, makes *Montgomery* a historically reasonable precedent for the compensability of nervous disorders resulting from gradually induced mental stimuli—a kind of cumulative mental injury. Larson notes that the compensation of mentally stimulated nervous injuries is a medically and legally sound proposition, "since there is no valid distinction between physical and 'nervous' injuries." Historically, the excuse for not compensating such disability rested upon evidentiary problems. With the advance of medical science, however, the excuse no longer exists. Simply because a disability manifests itself as a nervous disorder is no reason to deny compensation when it can be shown that the disability arose out of and in the course of employment. The nerves and the brain are as much a part of the human organism as an arm or a leg, and to deny compensation because the disability is nerve-related rather than limb-related is illogical. It is equally as illogical to say that nerve disorders must either result from a physical trauma or manifest themselves in a purely physical result. If a claimant can show that a visible physical disability resulted from a series of microtraumatic injuries, as was shown in *Lilly*, there should be no reason to prevent a claimant from showing that a series of microtraumatic psychological injuries resulted in a medically verifiable nervous injury. With several West Virginia cases standing for the compensability of nervous disorders in certain circumstances, and *Lilly* standing for the proposition that injuries can occur over a protracted period of time, the West Virginia court has manifested the willingness to compensate, in the proper fact situation, a mentally stimulated psychological disability.

Undoubtedly, the *Lilly* decision provides the court with a powerful tool for finding compensable any workmen's compensation

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85 1B LARSON, *supra* note 4, § 42.23.
86 *Id.*
87 *Id.*
claim based upon cumulative injury or mentally stimulated nervous disorders. That cumulative injury claims may now be compensated in West Virginia appears clear in light of the Lilly holding. By acknowledging that industrial injuries can occur over a protracted period of time, Lilly also creates a bridge over which the court may cross the gorge of case law holding that nervous disorders must be linked to a physically traumatic occurrence before compensability will lie. Before fully developing the case law for cumulative injuries and mentally stimulated nervous disorders, however, some very fundamental questions must be confronted, not the least important of which is the purpose of the compensation system.

V. The California Experience

While it is the law in West Virginia that an employee may receive compensation although he continues to work, it is universally acknowledged that the purpose of compensation is to remunerate the employee for his diminished capacity to participate in the labor marketplace. A workmen's compensation system does not pretend to make the claimant "whole," as is the purpose of a tort recovery. Rather, it provides society with a dignified means of preventing its working wounded from becoming destitute. While the payment of compensation in a Lilly-type fact situation is more in line with the basic premise of compensation, a much more difficult situation arises when the injury slowly occurs over twenty years and the claimant is due to retire. The latter situation is not all that infrequent, as an examination of some statistics from a jurisdiction where cumulative injuries have been compensated for some time will reveal.

The California Labor Code defines "injury" as including any injury or disease arising out of employment. In 1968 that section of the code was further refined to include injuries of a specific or cumulative nature. The effects of cumulative injury claims on the compensation system in California were the subject of a study conducted by the California Workers' Compensation Institute, an

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88 Evans v. Compensation Director, 150 W. Va. 161, 144 S.E.2d 663 (1965).
89 1 Larson, supra note 4, § 2.40.
90 Id. § 2.50.
employer and insurer organization. The study monitored cumulative injury claims during a two-month period in 1977. While some of the results of the study are not particularly surprising, they do point to some important problems with the compensation of cumulative injuries. The study notes that the median age of workers claiming cumulative injuries is fifty-one, compared to a median age of thirty-three for all claims made by the injured workforce. While this is not unusual considering that cumulative injuries occur over a protracted period of time, at least one worker in eleven is retired before claiming compensation. Since the median age of cumulative injury claimants is fifty-one, a large proportion of the workers filing such claims are in the process of leaving the active workforce voluntarily through early or regular retirement plans. The dollar allocation in cumulative injury claims also points to a relationship between cumulative injuries and retirement. The normal specific injury claim calls for about 22% of the total dollars spent to go for lost-time payments, while the figure in cumulative injury claims is 8%. While almost 40% of the total dollars spent for specific injuries goes for medical benefits, the figure is more than cut in half in cumulative injury cases—19%. Additionally, less than 0.2% of the cumulative injury dollar goes to returning the employee to the workforce through vocational rehabilitation programs. Instead, more than 70% of the cumulative injury claim dollar goes to compensating the employee for his reduced ability to compete in the open labor market, even though the typical claimant will soon be leaving that market.

Because cumulative injury claims are not particularly conducive to conventional means of proving compensability, the costs of delivering compensation are high. About 94% of all cumulative injury claims are litigated, and attorneys are retained in all but 1% of those cases. The average payment for cumulative injuries is $9,218, which is immediately reduced by a median attorney’s fee.
of $780. The employee receives about 92% of the award, but the litigation costs are substantially increased by the employer's costs, which often include the cost of the employee's forensic reports as an addition to the award. The result is a net litigation cost of $1,950 per claim. The fact that it costs $1,950 to deliver a net benefit to the employee of $8,438 results in an overhead factor of 23%. This overhead figure does not include the cost of hearing officers, court reporters, office space, and other items.

The allocation of costs in a cumulative injury claim where an employee has worked for numerous employers presents another significant problem for insurers and self-insurers. Prior to the 1978 enactment of California Labor Code § 5500.5, the cost of a cumulative injury claim was borne by employers during the most recent five years of the employee's exposure to the conditions giving rise to the injury. Once liability was established, the normal methods of apportionment were used to distribute the costs. However, if an employee worked for the same employer for more than five years, the costs were apportioned to all employers exposing the employee to the conditions precipitating the injury. Thus an employer, who thought his liability for a particular employee's compensable injury was terminated when the employment terminated, discovered that he had an open-ended liability which was never calculated into the experience ratings used by insurers to set premiums. While the five-year rule was intended to reduce the number of parties defendant in cumulative injury claims, one-half of the employees bringing such claims had worked for the same employer for more than five years, thus rendering the rule effective only 50% of the time.

Realizing the ineffectiveness of the five-year rule, the legislature adopted a plan which progressively reduces the period of liability so that by 1981, the costs of a cumulative injury claim will be borne by employers for whom the employee worked during the last year of exposure. The effect of this change is basically two-
fold. It will reduce the number of parties defendant in such claims and will avoid the problem of paying today's claim with yesterday's dollars, collected at a time when the dimensions and costs of cumulative injury claims were unknown. This modification, however effective it may be in helping employers and insurers calculate costs, does not approach the problem of apportioning costs so that the rigors of the eight-hour workday are not held solely responsible for the disabilities caused in part by the normal conditions of living and aging throughout the remaining sixteen hours of the workday. To state this more clearly: to what extent should consumers be expected to pay for the degenerative effects of, say, arthritis and rheumatism of a 61-year-old employee soon to leave the workforce voluntarily? Another question asked by some is whether wear and tear associated with employment is already compensated indirectly in the formula used to determine an employee's wage. While these questions may provoke philosophical discourse on the underlying purpose of wages, they are rendered moot by the development of workmen's compensation systems which compensate employees for degenerative work-related disabilities. The more important question now revolves around methods of separating work-related disabilities from those caused by the aging process and the other sixteen hours of an employee's day. While this may more properly be left to medical experts, there are some things employers can do to reduce the occurrence of cumulative injury claims.

VI. EMPLOYER PROTECTION: HOLDING THE LINE

Certainly one of the most important steps an employer can take to limit his compensation liability for cumulative injuries involves the use of extensive preemployment physicals. One insurance expert suggests that extensive preemployment physicals with significant documentation as to the amount of disability already existing in an employee at the time of hire serve two essential purposes. When a claim does arise, sufficient evidence will be on hand to document how much of the disability is work-related. Secondly, preemployment physicals will single out employees with existing disabilities so that the employee may be placed on a job which will not aggravate that disability. Although most employers provide some sort of preemployment physical, those phys-

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111 Id.
icals are, for the most part, inadequate for detecting the sophisticated mental and physical disabilities which may ultimately cost the employer a great deal. Preemployment physicals do present some problems, however. An employer has no duty to perform such physicals, but if he does perform a physical and negligently fails to discover a disability, he may be held liable. Additionally, employers subject to the law concerning affirmative action in the hiring and advancement of the handicapped may find that they have the burden of justifying their refusal to hire an individual because of that person's physical condition.

Periodic health examinations of current employees also provide a means of detecting trouble before it develops into an industrial disability claim. A ten year old health testing program at the IBM Corporation uncovered previously undetected illnesses in one-third of the employees examined. About 50% of the findings had been previously unknown by the employees, and 1.5% of the examinations produced findings that were serious enough to warrant emergency notification of the employees.

Probably the most important and most obvious method of limiting work-related disability is keeping the work environment free of hazards and designing jobs which minimize the possibilities that a disability may result. There are few good excuses for allowing an employee to perform a job which requires him to stretch to pull a lever when a simple extension of the lever would eliminate the potentially disabling act. These types of changes in the working environment, along with extensive preemployment and periodic physicals, will do as much to eliminate work-related disabilities and their consequent expenses as will all of the legislative and judicial struggles now waged by employers trying to limit developing statutory and case law.

Legislative and judicial struggles should in no respect be abandoned. Questionable claims should always be litigated with vigor. An employer's legislative clout should never be ignored, especially with respect to the current trend toward coordinating workmen's compensation benefits with a myriad of other benefits, such as pensions and social security, to which a vast majority of American workers are now entitled.

113 41 C.F.R. §§ 60-741.1 to .54 (1978).
114 McQuade, Those Annual Physicals Are Worth the Trouble, FORTUNE (Jan. 1977), at 164-173.
115 An Ohio appellate court recently ruled that employers may deduct from
VII. Conclusion

The development of the cumulative injury concept trauma in the Lilly case freed the West Virginia court from the patently unworkable rule that an injury had to result from an isolated, fortuitous event or result. Additionally, Lilly allows the court to take a more realistic and vigorous approach to the compensation of injuries formerly considered noncompensable and to this end may serve as a means of developing a more equitable system of dealing with injuries in the workplace.

However, the principles championed in Lilly cannot be allowed to develop in a vacuum devoid of the economic and social realities of contemporary business. For a balanced development of the Lilly principles to take place, those involved in the compensation system must not lose sight of the underlying principle that workmen's compensation was conceived to remove the adversarial system from the industrial environment.

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