Buffalo Law Review

Volume 16 | Number 3 Article 10

4-1-1967

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Recommended Citation
Peter J. Brevorka, *Mental Stress and Mental Injury in New York Workmen's Compensation*, 16 Buff. L. Rev. 727 (1967).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss3/10

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COMMENTS

MENTAL STRESS AND MENTAL INJURY IN NEW YORK WORKMEN'S COMPENSATION

Recent years have witnessed a change in the interpretation of the Workmen's Compensation Law in New York, which has enlarged the field of recognized causes of compensable injuries. The courts have begun to acknowledge the influence which emotional pressures may have upon the employee; thus, compensation has been awarded when various forms of emotional pressure have resulted in a disabling physical injury. However, the disabling injuries have been heart attacks in most of these cases, and as a consequence, the expansion of this area has been shackled by the doctrines developed in earlier heart cases. Although the New York courts have recognized that emotional injury following physical impact is compensable, they have refused to grant compensation when the employee has suffered an emotional injury resulting solely from emotional stress.

This survey will first examine the general background of the New York Workmen's Compensation Law, placing particular emphasis on cases involving heart attack. An examination of the cases of emotional injury caused by physical impact will be followed by a discussion of the development of compensability of physical injury resulting from emotional strain. Finally the few cases in New York of mental injury resulting from mental stress will be discussed with a recommendation as to the direction which should be taken in New York.

I. Background

Section 10 of the Workmen's Compensation Law of New York declares: "Every employer . . . shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury. . . ." Section 2(7) of the statute provides that: " 'Injury' and 'personal injury' means only accidental injuries arising out of and in the course of employment. . . ." Thus for an injury to be compensable under this statutory scheme three requirements must be met. First, the injury must be "accidental"; second, it must arise out of the employment; and finally, it must be in the course of the employment. Whether an injury was sustained in the course of employment is not within the scope of this survey, rather the following discussion will be restricted to the second and, particularly, the first requirements of compensability.

"Arising out of the employment" has been interpreted to mean that the workman must be disabled because of the employment.[1] For compensation to be awarded "the personal injury must be the result of the employment and flow

1. McGrinder v. Sullivan, 264 App. Div. 640, 37 N.Y.S.2d 1 (3d Dep't 1942), *rev'd on other grounds*, 290 N.Y. 11, 47 N.E.2d 421 (1943).

from it as the inducing proximate cause."[2] But injuries which "merely are contemporaneous or coincident with the employment" are not compensable.[3]

In addition to "arising out of" the employment, the injury also must be "accidental." This term itself requires definition. According to the New York courts, suddenness is the primary element of an accident:[4] there must be some single incident which would be regarded as an accident by the common man.[5] The event "need not be a happening of great magnitude or of dramatic force . . . it is enough if it is a happening particularized in time and occurrence."[6] However, the *cause* of the accident need not be sudden in order for the injury to be compensable. The suddenness requirement may be fulfilled by a *sudden cause* or by a *sudden result*, as long as one of these elements is present to endow the accident with a particularized time and occurrence.[7] A scratch on the neck through which germs enter the body causing disease to develop gradually is an illustration of a sudden cause (the scratch) leading to a gradual result (the disease).[8] A constant draft on the neck causing a collapsed neck is an instance of a gradual cause (the draft) resulting in a sudden result (the neck collapse).[9] However, continual exposure to the elements, causing bursitis and gradual loss of use of an arm would not be compensable, since neither a sudden cause nor sudden result is present.[10]

Generally, any injury sustained in the course of employment meeting both the "arising out of" test and the suddenness requirement will be considered "accidental." However the New York courts have treated *heart attack* cases differently by requiring an additional element to establish an "accident": the employee must prove the heart attack was caused by some unusual or excessive strain of the work.[11] Until 1950 this requirement of unusual strain was applied rather strictly in denying compensation in many heart attack cases.[12] But in

2. Alpert v. J. C. & W. E. Powers, 223 N.Y. 97, 102, 119 N.E. 229, 230 (1918).
3. *Id.* at 101, 119 N.E. at 230.
4. Deyo v. Village of Piermont, 283 App. Div. 67, 69, 126 N.Y.S.2d 523, 525 (3d Dep't 1953).
5. *Ibid.* See also Jeffreyes v. Charles H. Sager Co., 198 App. Div. 446, 191 N.Y. Supp. 354 (3d Dep't 1921), *aff'd*, 233 N.Y. 535, 135 N.E. 907 (1922): "The word 'accident' is derived from the Latin verb 'accidere,' signifying 'fall upon, befall, happen, chance' . . . and denotes an event which occurs upon the instant rather than something which continues, progresses or develops." *Id.* at 447, 191 N.Y. Supp. at 355; Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925).
6. Ussach v. Carolee Shops, Inc., 282 App. Div. 902, 903, 124 N.Y.S.2d 770, 771 (3d Dep't 1953).
7. Scuderi v. Miss Ann Dresses, Inc., 24 A.D.2d 905, 265 N.Y.S.2d 465 (3d Dep't 1965); Greensmith v. Franklin Nat'l Bank, 21 A.D.2d 576, 251 N.Y.S.2d 875 (3d Dep't 1964), *aff'd*, 16 N.Y.2d 973, 212 N.E.2d 774, 265 N.Y.S.2d 288 (1965); Kot v. Crouse-Hinds Co., 281 App. Div. 935, 119 N.Y.S.2d 652 (3d Dep't 1953).
8. *E.g.*, Connelly v. Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366 (1925).
9. *E.g.*, Greensmith v. Franklin Nat'l Bank, 21 A.D.2d 576, 251 N.Y.S.2d 875 (3d Dep't 1964), *aff'd*, 16 N.Y.2d 973, 212 N.E.2d 774, 265 N.Y.S.2d 288 (1965).
10. *E.g.*, Deyo v. Village of Piermont, 283 App. Div. 67, 126 N.Y.S.2d 523 (3d Dep't 1953).
11. See, *e.g.*, Schechter v. State Ins. Fund, 6 N.Y.2d 506, 160 N.E.2d 901, 190 N.Y.S.2d 656 (1959).
12. See, *e.g.*, La Fountain v. La Fountain, 259 App. Div. 1095, 21 N.Y.S.2d 193 (3d Dep't), *aff'd*, 284 N.Y. 729, 31 N.E.2d 199 (1940) (shoeing horses not excessive strain);

that year, the Court of Appeals said: "Whether a particular event was an industrial accident is to be determined, not by any legal definition, but by the common-sense viewpoint of the average man."[13] This average man standard has been applied to the requirement of excessive strain of the earlier heart attack cases and is the present-day test for determining whether a heart attack is compensable.[14]

For a heart attack to be compensable, the work causing it must entail strain or exertion which is greater than the ordinary wear and tear of life.[15] This "ordinary wear and tear of life" is not to be measured by the everyday life of the claimant,[16] but by a general *objective* standard:[17] it is not whether the task is excessive merely for the claimant, but whether the strain would be excessive when compared with the ordinary wear and tear of life for the average individual.[18] The fact that the strain causing the injury is merely the normal work done by the employee is not dispositive of the question of whether there has been excessive strain—the inquiry is only whether the strain is greater than the ordinary wear and tear of life.[19]

Apparently this additional requirement for Workmen's Compensation recovery for a heart attack, while applied in all heart attack cases, is directed primarily at the aggravation of pre-existing heart weakness in an attempt to prevent recovery for mere progression of the weakness or disease.[20] Pre-existing heart weakness will not preclude recovery, as was shown in *Masse v. James H. Robinson Co.*,[21] in which the Court of Appeals said, "A heart injury such as coronary occlusion or thrombosis when brought on by *overexertion or strain* in the course of daily work is compensable, though a pre-existing pathology may have been a contributing factor."[22] But aggravation of a pre-existing heart condition incurred in the course of employment without unusual or excessive strain which is greater than the wear and tear of ordinary life is not an "accident" and thus is non-compensable.[23]

Dwork v. E. Greenbaum Co., 261 App. Div. 1022, 25 N.Y.S.2d 829 (3d Dep't), *aff'd*, 287 N.Y. 555, 38 N.E.2d 224 (1941) (pushing rack loaded with meat not excessive strain).

13. Masse v. James H. Robinson Co., 301 N.Y. 34, 37, 92 N.E.2d 56, 57 (1950).

14. Burris v. Lewis, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957).

15. *Ibid.*

16. Traversone v. Lee Bros. Storage, Inc., 17 A.D.2d 175, 233 N.Y.S.2d 328 (3d Dep't 1962).

17. Apparently this objective standard is more hoped for than attained, see text at *infra* notes 32-37.

18. Bosted v. Larsen Baking Co., 19 A.D.2d 924, 244 N.Y.S.2d 3 (3d Dep't 1963); Traversone v. Lee Bros. Storage, Inc., 17 A.D.2d 175, 233 N.Y.S.2d 328 (3d Dep't 1962).

19. Schechter v. State Ins. Fund, 6 N.Y.2d 506, 160 N.E.2d 901, 190 N.Y.S.2d 656 (1959); Maher v. Agawan Aircraft Prod., 22 A.D.2d 742, 253 N.Y.S.2d 395 (3d Dep't 1964); Johnson v. Swift & Co., 10 A.D.2d 656, 196 N.Y.S.2d 330 (3d Dep't 1960); Gioia v. A. J. Courtmel Co., 283 App. Div. 40, 126 N.Y.S.2d 94 (3d Dep't 1953).

20. 1A Larson, Workmen's Compensation § 38.64(a) at 616 (1966).

21. 301 N.Y. 34, 92 N.E.2d 56 (1950).

22. *Id.* at 37, 92 N.E.2d at 57 (Emphasis added.).

23. Bloom v. Israel Cohen & Son, 16 A.D.2d 841, 227 N.Y.S.2d 747 (3d Dep't 1962); Bobb v. Weaderhorn Constr. Co., 8 A.D.2d 888, 186 N.Y.S.2d 814 (3d Dep't 1959); Moses v. Steel Drum Co., 8 A.D.2d 864, 186 N.Y.S.2d 953 (3d Dep't 1959).

The requirement of unusual strain has been applied only to pre-existing *heart* weakness and not to other types of pre-existing weaknesses, even though many of the latter could possibly be regarded as similar to heart weakness. In *Kayser v. Erie County Highway Dep't*,[24] where the claimant was raking slag when he suffered a ruptured aorta, the court said:

> The case is similar to one where the usual effort of employment causes a failure in a previously weakened body structure, as where a poorly healed fracture of the arm might fail with ordinary lifting. Here the usual effort is shown to have caused a specific failure in a specific artery. This has always been regarded as an industrial "accident."[25]

Another case held that "it was not necessary to find unusual effort where the work caused an actual tear in the tissue of the aorta."[26] There are non-heart cases with pre-existing weaknesses in which events which could be interpreted as the ordinary wear and tear of life have been held to be compensable accidents, for example, where decedent had a hypersensitivity to bee venom and death resulted from a solitary sting which occurred while in the course of his employment.[27] It would seem that occasional bee stings could reasonably be considered as the ordinary wear and tear of life and that if the heart attack rationale were applied the claimant would be denied compensation. But the heart rationale was not applied and decedent's widow was allowed to recover.[28]

Why do the courts make such a distinction and require proof of excessive strain greater than the ordinary wear and tear in heart cases? In the *Kayser* case, the Appellate Division said: "The 'heart cases' where it is usually required to show some special effort as a precipitating cause of the attack, stand in a class by themselves, but they do so because their generalized nature make it difficult factually to attribute the attack to the work."[29] Yet it does not appear that heart attacks are actually that much harder to prove to be factually related to the job (*i.e.*, that they arose out of the employment) than other types of injury, such as a cerebral hemorrhage, which is compensable and not subject to such special requirements.[30] Hence, the difficulty of factually attributing the heart attack to the work does not seem to be a compelling reason for distinguishing heart attacks from other types of injuries.

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24. 276 App. Div. 789, 92 N.Y.S.2d 612 (3d Dep't 1949).
25. *Id.* at 789, 92 N.Y.S.2d at 613.
26. Swatzki v. Friedman, 4 A.D.2d 907, 908, 166 N.Y.S.2d 920, 921 (3d Dep't 1957). *Accord*, Dodson v. Frank Vanecek & Son, 24 A.D.2d 787, 263 N.Y.S.2d 774 (3d Dep't 1965); Sorace v. General Elec. Co., 5 A.D.2d 711, 168 N.Y.S.2d 770 (3d Dep't 1957); Brancato v. John W. Cowper Co., 282 App. Div. 752, 121 N.Y.S.2d 813 (3d Dep't 1953).
27. Webster v. Mason, 13 A.D.2d 355, 217 N.Y.S.2d 290 (3d Dep't 1961).
28. For examples of other cases where compensation has been awarded in non-heart cases for what appears to be the ordinary wear and tear of life, see Hughes v. Trustees of St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927) (compensation awarded for heat prostration "although the risk may be common to all who are exposed to the sun's rays on a hot day." *Id.* at 202, 156 N.E. at 665); Ussach v. Carolee Shops, Inc., 282 App. Div. 902, 124 N.Y.S.2d 770 (3d Dep't 1953) (merely bending over caused compensable back strain)
29. 276 App. Div. 789, 92 N.Y.S.2d 612, 613 (3d Dep't 1949).
30. See, *e.g.*, Brancato v. John W. Cowper Co., 282 App. Div. 752, 121 N.Y.S.2d 813 (3d Dep't 1953).

Even assuming that it is more difficult to attribute heart attacks to the work than other types of injuries, there still is no sound reason for applying the ordinary wear and tear standard to heart cases. The Workmen's Compensation Law, which is the basis for authorizing compensation, contains no requirement of proving strain in excess of ordinary wear and tear in order for heart attacks to be compensable.[31] If the claimant is able to prove that the heart attack arose out of the employment he has met the burden which the courts have imposed in awarding compensation in heart cases (*i.e.*, showing that the attack is traceable to the work) and no valid reason appears for requiring the claimant to also show that there has been a strain greater than the court determines to be the ordinary wear and tear of life.

Beside the fact that the ordinary wear and tear test has gone beyond the requirements of statutory authorization, the standard has bred a fair degree of confusion. It is virtually impossible to define the ordinary wear and tear of life. For example, one case held climbing a flight of thirty stairs out of a subway was excessive strain,[32] while another held carrying tools up a flight of stairs to the second floor and descending was merely the ordinary wear and tear of life.[33] Climbing a ladder was held to be excessive strain in one case,[34] but not in another.[35] Lifting a fifty pound nail keg has not been considered excessive strain,[36] while lifting a forty pound box has been considered strain greater than the ordinary wear and tear of life.[37] This confusion makes the prediction of whether a heart attack will be compensable more difficult, in turn encouraging employers to appeal these awards, and increasing the amount of time and money expended by the claimant in pressing his claim. The result is to frustrate two of the main attributes of the Workmen's Compensation system—speed and economy.

According to Professor Arthur Larson, the practical consideration for distinguishing heart cases from all others is the fear that, unless some kind of arbitrary limits were set, the number of claims for heart attacks under Workmen's Compensation would become unmanageable and heart attacks would become compensable whenever they took place within the time and space limits of employment.[38] But, if the excessive strain requirement were abolished, the employee would still have to meet his burden of proving that the employment was the cause of the heart attack (that it arose out of the employment) and generally, absent some noticeable strain, it would seem that this would be virtually impossible to prove.

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31. N.Y. Workmen's Comp. Law §§ 2(7), 10.

32. Kehoe v. London Guar. & Acc. Ins. Co., 278 App. Div. 731, 103 N.Y.S.2d 72 (3d Dep't 1951).

33. Bloom v. Israel Cohen & Son, 16 A.D.2d 841, 227 N.Y.S.2d 747 (3d Dep't 1962).

34. Harmonay v. Harmonay, 24 A.D.2d 800, 263 N.Y.S.2d 623 (3d Dep't 1965).

35. O'Brien v. Ronneberg, 8 A.D.2d 880, 186 N.Y.S.2d 725 (3d Dep't 1959).

36. Burris v. Lewis, 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957).

37. Greschwer v. Tee Jay Toys, Inc., 15 A.D.2d 615, 222 N.Y.S.2d 771 (3d Dep't 1961).

38. 1A Larson, Workmen's Compensation § 38.81, at 622.16 (1966).

II. Mental Stresses and Mental Injuries

Against this background of the requirements for a compensable injury,—"arising out of," suddenness, and the ordinary wear and tear rule of heart cases—the incidence of mental stresses and injuries in Workmen's Compensation cases should be considered. The types of injuries in this area may be divided into three categories: physical impact resulting in emotional injury; emotional stress resulting in physical injury; and emotional stress resulting in purely emotional injury.

A. *Emotional Injury Resulting From Physical Impact*

The most common case in the area of physical impact causing emotional injury is one in which the employee suffers mental injury following a physical stress or injury; for instance, where the claimant is struck on the head and subsequently suffers brain damage,[39] memory lapse,[40] or psychosis.[41] The courts have had no great difficulty in finding a compensable injury in these cases. The courts have allowed compensation if the physical injury meets all the requirements of the statute and if the mental injury is a natural result of the physical injury. Compensation has also been granted where the employee has been physically injured and later develops a form of mental illness arising from worry over the injury[42] or from the whole complex of psychic factors associated with the injury.[43] There has been one interesting case in which the physical injury, rather than causing brain damage or generalized anxiety over the injury, merely acted as a triggering device for an already present mental illness. In this case, the claimant was bitten by a cat and, while the injuries were trivial, he developed a psychoneurotic fear of being stricken with rabies.[44] There has also been an instance in New York were compensation has been awarded for a so-called compensation neurosis (a neurosis caused by a subconscious desire to get compensation). Claimant was injured and unable to work; when compensation payments stopped, claimant had to go on relief and became worried over how his family was going to survive if further compensation which was pending was not granted. As a result of this anxiety, claimant developed dementia preacox (schizophrenia) which medical testimony said was precipitated by the train of events.[45]

Little else needs be said about these cases. They seem to be in accord with the spirit of the Workmen's Compensation Law (to award compensation for disabling injury caused by the job) and present psychiatric knowledge. They are

39. Daugherty v. Midland Print. Co., 14 A.D.2d 961, 221 N.Y.S.2d 70 (3d Dep't 1961).
40. Russo v. Art Steel Co., 14 A.D.2d 605, 218 N.Y.2d 407 (3d Dep't 1961).
41. Ramos v. Wolf Die Cutting Co., 7 A.D.2d 686, 179 N.Y.S.2d 270 (3d Dep't 1958); Wallace v. Bell Aircraft Corp., 276 App. Div. 800, 93 N.Y.S.2d 162 (3d Dep't 1949) (head injury caused compensable neurosis).
42. Rothwell v. Shipley Constr. & Supply Co., 244 N.Y. 558, 155 N.E. 896 (1927); Edmonds v. Kalfaian & Sons, Inc., 9 A.D.2d 551, 189 N.Y.S.2d 456 (3d Dep't 1959).
43. Griffiths v. Shaffrey, 283 App. Div. 839, 129 N.Y.S.2d 74 (3d Dep't 1954).
44. Kalikoff v. John Lucas & Co., 271 App. Div. 942, 67 N.Y.S.2d 153 (3d Dep't 1947).
45. Rodriguez v. New York Dock Co., 256 App. Div. 875, 9 N.Y.S.2d 264 (3d Dep't 1939).

particularly indicative of the willingness of the New York courts to recognize mental illness as a compensable injury under Workmen's Compensation.

B. *Physical Injury Resulting From Mental Stress*

The first apparent case of mental stress causing physical injury arose in 1920 in *O'Connell v. Adirondack Elec. Power Corp.*[46] The claimant, who was the manager of the power company, was put under some degree of stress and anxiety in attempting to restore power during a power failure. About an hour after electric power was finally re-established claimant experienced a heart attack. The court, in denying compensation, said the only accident (in the colloquial rather than the statutory sense) present was the power failure and that, "clearly a man has not sustained an injury whose mind has been made abnormally active, or whose nerves have been more than ordinarily excited. Consequently the accident, if one there was, was unaccompanied by any injury whatsoever."[47] The position of the courts on the matter of emotional stress causing physical injury gradually changed. In 1926 in *Pickerell v. Schumacher*,[48] the Appellate Division and the Court of Appeals affirmed an award of compensation to a claimant who suffered a stroke after trying to avoid an accident when his emergency brake gave way. There was no written opinion by either court, but in the statement of the case in the Court of Appeals decision it was said, "the claim for compensation was made upon the theory that the claimant in attempting to avert an accident sustained a cerebral apoplexy, due to increased muscular effort in the operation of an automobile hearse."[49] It might be argued the decision only grants compensation in the case of stroke caused solely by physical strain, but in *Thompson v. City of Binghamton*,[50] the *Pickerell* case was read as awarding compensation for physical injury resulting from anxiety.[51] This, in effect, overruled *O'Connell* and opened the door for claims of physical injury resulting from emotional strain.[52]

The cases in this area of emotional strain resulting in physical injury may be divided into two main categories: those involving short or sudden emotional strain and those involving a more extended or gradual strain.

New York courts have awarded compensation fairly readily where there is sudden fright which results in injury (generally a heart attack).[53] In these cases the sudden fright meets the suddenness requirement of an "accident" and the

46. 193 App. Div. 582, 185 N.Y. Supp. 455 (3d Dep't 1920).
47. *Id.* at 584, 185 N.Y. Supp. at 456.
48. 215 App. Div. 745, 212 N.Y. Supp. 899 (3d Dep't 1925), *aff'd*, 242 N.Y. 577, 152 N.E. 434 (1926).
49. 242 N.Y. at 577, 15 N.E. at 434.
50. 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926).
51. *Id.* at 453, 218 N.Y. Supp. at 357.
52. Thompson v. City of Binghamton, 218 App. Div. 451, 218 N.Y. Supp. 355 (3d Dep't 1926) (granted compensation for heart attack caused by the excitement of a false alarm).
53. Pukaluk v. Insurance Co. of No. Am., 7 A.D.2d 676, 179 N.Y.S.2d 173 (3d Dep't 1958): "Many years ago it was held in substance that an injury resulting from fright alone might be classified as a compensable accident. . . ." *Id.* at 676, 179 N.Y.S.2d at 175.

overexertion requirements of the heart cases.[54] Thus compensation has been granted where claimant suffered a heart attack caused by sudden fright such as someone sneaking up behind him,[55] or where claimant has just narrowly avoided a collision with another car.[56]

However, compensation has been withheld where physical injury (again a heart attack) has followed an emotional situation of short duration (five minutes to an hour), such as a verbal dispute with a foreman.[57] The courts, in refusing to award compensation in these short-argument cases, have applied a variation of the ordinary wear and tear requirement of other heart cases.

> [F]rom the common-sense viewpoint of the average man [these brief arguments] would be regarded as neither involving nor inducing emotional strain or tension greater than the countless differences and irritations to which all workers are occasionally subjected without untoward result.[58]

This rationale is subject to all of the criticisms of the ordinary wear and tear requirement of the usual heart cases.[59] It may be argued that it is little more than fortuitous that the claimant had his heart attack as a result of a commonplace argument with his foreman rather than an argument with a police officer trying to give him a traffic ticket. However, this does not change the fact that the argument developed out of the employment situation and that it was the precipitating cause of the heart attack. It may also be argued that if such cases are granted compensation, there will be a flood of claims for heart attacks allegedly resulting from such verbal disputes. But this is not necessarily true: the claimant would still have to meet his burden of proving that the argument *caused* the heart attack. This would tend to restrict claims to those heart attacks which are legitimately caused by work-connected arguments. Also, even if there is a flood of sufficiently proven claims, it need only be pointed out that this is the purpose of Workmen's Compensation— to award compensation for injuries arising out of and in the course of employment.

Compensation awards for physical injuries (generally heart attacks) resulting from protracted emotional strain have been a fairly recent development in

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54. Eckhaus v. Adeck Stores, Inc., 11 N.Y.S.2d 862, 227 N.Y.S.2d 680 (1962).

55. Pukaluk v. Insurance Co. of No. Am., 7 A.D.2d 676, 179 N.Y.S.2d 173 (3d Dep't 1958).

56. Eckhaus v. Adeck Stores, Inc., 11 N.Y.2d 862, 227 N.Y.S.2d 680 (1962); Wachsstock v. Skyview Transp. Co., 5 A.D.2d 1028, 173 N.Y.S.2d 405 (3d Dep't 1958); Wiltcher v. National Transp. Co., 283 App. Div. 977, 130 N.Y.S.2d 586 (3d Dep't 1954).

57. Connors v. Secon Sec., Inc., 24 A.D.2d 674, 261 N.Y.S.2d 136 (3d Dep't 1965), *appeal denied*, 16 N.Y.2d 486 (1965); Pinkus v. Hod Carmel Kosher Provis. Co., 24 A.D.2d 782, 263 N.Y.S.2d 853 (3d Dep't 1965); Wilson v. Tippetts-Abbott-McCarthy-Stratton, 22 A.D.2d 720, 253 N.Y.S.2d 149 (3d Dep't 1964); Samolin v. Transworld Airlines, Inc., 20 A.D.2d 160, 245 N.Y.S.2d 628 (3d Dep't 1963); Cramer v. Barney's Clothing Store, 15 A.D.2d 329, 223 N.Y.S.2d 813 (3d Dep't 1962), *aff'd*, 13 N.Y.2d 711, 191 N.E.2d 901, 241 N.Y.S.2d 844 (1963); Santacroce v. 40 W. 20th Street, Inc., 9 A.D.2d 985, 194 N.Y.S.2d 541 (3d Dep't 1959), *aff'd*, 10 N.Y.2d 855, 178 N.E.2d 912, 222 N.Y.S.2d 689 (1961).

58. Wilson v. Tippetts-Abbott-McCarthy-Stratton, 22 A.D.2d 720, 253 N.Y.S.2d 149, 150 (3d Dep't 1964).

59. See text accompanying notes 28-38 *supra*.

New York State law.[60] In 1955 in *Lesnik v. National Carloading Corp.*,[61] the Appellate Division refused to grant compensation to a business executive who had been under heavy emotional stress for approximately five months and who suffered a heart attack while at a race track. The Court held:

> The illness shown in this record is not accidental because no eventful happening can be demonstrated to have caused it; and its only connection with the work is a gradual physical deterioration over a period of time. So settled has been the viewpoint of the Legislature and of the profession that this kind of physical deterioration is not accidental in the sense used in the Workmen's Compensation Law, that diseases growing from employment, but not caused by a definite happening in the work have been placed in a class by themselves, treated as special risks, and given a separate allocation in the compensation structure.[62]

In 1961 in *Klimas v. Trans Caribbean Airways*,[63] the Court of Appeals effectively overruled the *Lesnik* case. In *Klimas*, the claimant's employer was threatening to hold claimant responsible for damage done to a company plane. Claimant underwent about three days of intense emotional pressure, which culminated in a heart attack. The Court, primarily relying on the sudden fright cases, held that the average man would view this as an "accident," and said,

> we think it may not be gainsaid that undue anxiety, strain and mental stress from work are frequently more devastating than a mere physical injury, and the courts have taken cognizance of this fact in sustaining awards where no physical impact was present. . . .[64]

Lesnik was distinguished as having had insufficient medical testimony to establish a causal connection between exertion and injury. The fact that Klimas suffered his heart attack while in a swimming pool of a motel was not considered significant, the Court saying that even while he was at rest his problems continued to surround him and hence he merited compensation.[65]

Since *Klimas* there have been cases granting compensation for heart attacks and similar injuries resulting from the emotional strain of such things as a twelve-hour hearing,[66] a two-day argument,[67] and a night of anxiety.[68] But the most interesting progeny of *Klimas* have been cases in which the emotional strain to

60. *But see* Furtardo v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 745 (3d Dep't 1948); Church v. Westchester County, 253 App. Div. 859, 1 N.Y.S.2d 581 (3d Dep't 1938).

61. 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955), *aff'd*, 309 N.Y. 958, 132 N.E.2d 326 (1956).

62. *Id.* at 651, 140 N.Y.S.2d at 909.

63. 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961).

64. *Id.* at 213, 176 N.E.2d at 716, 219 N.Y.S.2d at 16.

65. *Id.* at 215, 176 N.E.2d at 717, 219 N.Y.S.2d at 18.

66. Hamilton v. Transport Workers Union, 21 A.D.2d 434, 251 N.Y.S.2d 104 (3d Dep't 1964).

67. Chavkin v. Rotter, 20 A.D.2d 158, 245 N.Y.S.2d 435 (3d Dep't 1963).

68. Albarella v. Glick Dev., Inc., 19 A.D.2d 920, 244 N.Y.S.2d 107 (3d Dep't 1963). See also Goodwin v. New York State Workmen's Comp. Bd., 20 A.D.2d 951, 249 N.Y.S.2d 63 (3d Dep't 1964); Schwartz v. Hampton House Mgmt. Corp., 14 A.D.2d 936, 221 N.Y.S.2d 286 (3d Dep't 1961).

which the claimant was subjected has a duration of several years rather than days. In *Davis v. Drug & Hosp. Employees Union*,[69] claimant was awarded compensation for a heart attack suffered in 1963 while trying to persuade some workers to change their union affiliation. The record showed that since early 1959 the claimant had led a rather hectic life, working long hours seven days a week, becoming involved in heated negotiations and strikes. Medical testimony established a link between such activities and the claimant's myocardial infraction and the Appellate Division held that the board could reasonably find a compensable accident under the authority of *Masse, Klimas*, and related cases.[70]

In *Baumritter v. 11 Union Pharmacy, Amalgam. Health & Drug Plan, Inc.*,[71] decedent was subjected to a great deal of strain for about two years, during which he had to use a large amount of his own money in an unsuccessful attempt to stem the tide of business difficulties due to a series of shortages. The Appellate Division held that there was sufficient evidence of unusual emotional strain to support a compensation award.[72]

These cases could present an expanded view of what will be recognized as the cause of a compensable heart attack. It now appears that the harried young executive who works himself into an early grave will leave his dependents a recognizable claim for Workmen's Compensation benefits. But this projection may be limited by the recent case of *Greenfield v. Goldrich*,[73] in which compensation was denied to a lawyer who suffered a heart attack. The Appellate Division summarily affirmed the denial of the award where the board found that the claimant's work as an attorney

> neither involved nor induced emotional strain or tension greater than is involved in, or is induced by, the countless irritations commonly encountered in the *usual practice of such profession* in its daily activities without untoward results; therefore claimant did not sustain an accidental injury arising out of and in the course of employment.[74]

This could indicate a digression from the objective standard of wear and tear of life in general, to ordinary wear and tear of the particular profession.[75] Or, this case could indicate that the Appellate Division does not believe that the practice of law usually carries with it strain greater than the ordinary wear and tear of life. Or, the case could be an aberration. At this time it is difficult to forecast which direction the courts will take.

C. *Mental Injury Resulting From Emotional Stress*

In New York, there have not been many cases in this area, and the existing cases are somewhat confusing.

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69. 24 A.D.2d 1059, 265 N.Y.S.2d 342 (3d Dep't 1965).
70. *Id.* at 1059, 265 N.Y.S.2d at 344.
71. 26 A.D.2d 869, 274 N.Y.S.2d 30 (3d Dep't 1966).
72. *Id.* at 869, 274 N.Y.S.2d at 31.
73. 26 A.D.2d 600, 271 N.Y.S.2d 504 (3d Dep't 1966).
74. *Id.* at 600, 271 N.Y.S.2d at 505 (Emphasis added.).
75. *Supra* note 14 and accompanying text.

In 1959 the Appellate Division decided *Chernin v. Progress Serv. Co.*,[76] where claimant, while driving a cab for his employer, struck a pedestrian and approximately a month later suffered a mental breakdown. Testimony was given to the effect that claimant caused a disturbance during the investigation of the accident and that he developed a psychosis following the accident. Other witnesses said they noticed nothing unusual in his behavior after the accident. The board awarded compensation but the Appellate Division reversed:

> . We find nothing in the law that connotes purely excessive emotions —anger, grief, or other mental feelings—unaccompanied by physical force or exertion can be the basis of an accident. The record here discloses that claimant became angry which resulted in an emotional strain and superimposed upon a pre-existing mental condition resulted in the claimant's disability.
>
> It may logically be argued that claimant here is just as disabled as someone suffering from a physical disability. This we do not dispute but it does not, at present, constitute an accident as defined by the Workmen's Compensation Law. It is not within our province to decide otherwise.[77]

The Court of Appeals affirmed on the ground that the facts did not warrant a finding that claimant suffered an "accidental" injury on the date of the collision: "We do not decide whether an occurrence arising out of and in the course of employment which causes psychological trauma may in any case be compensable even though there was no physical injury."[78]

In 1961 the Appellate Division noted this language of the Court of Appeals in ruling in a somewhat unrelated case of physical injury precipitated by emotional causes.[79]

In 1962 the complications set in. In *Straws v. Fail*,[80] claimant asserted that he should receive compensation for psychological disablement resultant from the emotional strain of having a fellow employee expire in his arms. The board denied compensation on the basis of the Appellate Division's decision in *Chernin* (the Court of Appeals ruling not yet having been announced). The Appellate Division in affirming the board made no mention of the Court of Appeals decision in *Chernin* (which the Appellate Division had cited in 1961) but merely discussed its own holding in *Chernin*: "There we held that a mental injury precipitated by a mental cause provided no basis for an award of disability benefits. We perceive no reason to disturb the findings of the Board."[81] To compound this confusion the Court of Appeals refused to review the decision in *Straws v. Fail*.[82] Thus, the decision of the Court of Appeals in *Chernin* left the door open to such claims, the Appellate Division in *Straws* for some reason neglected to take note

76. 9 A.D.2d 170, 192 N.Y.S.2d 758 (3d Dep't 1959).
77. *Id.* at 172, 192 N.Y.S.2d at 760.
78. 9 N.Y.2d 880, 881, 175 N.E.2d 827, 828, 216 N.Y.S.2d 697, 698 (1961).
79. Schwartz v. Hampton House Mgmt. Corp., 14 A.D.2d 936, 221 N.Y.S.2d 286 (3d Dep't 1961).
80. 17 A.D.2d 998, 233 N.Y.S.2d 893 (3d Dep't 1962).
81. *Id.* at 998, 233 N.Y.S.2d at 894.
82. 12 N.Y.2d 647 (1963).

of this, and the Court of Appeals left the state of the law unclear by refusing to review *Straws*.

There have been cases in other states where a sudden fright triggered a neurosis,[83] and a number of these were cited by Chief Judge Desmond, with some degree of approval, dissenting in *Klimas*.[84] A new step into compensation for mental injury due to a gradual strain was taken in *Carter v. General Motors Corp.*,[85] when the Supreme Court of Michigan affirmed an award of compensation where the mental strain of assembly line work gradually resulted in a mental breakdown for the claimant. These states have viewed the human body as an integrated whole and have said that injury to the mind is as devastating as injury to the body and is thus compensable.[86] On the other hand, a number of states have held that mental injuries caused by mental stresses do not constitute a compensable accident.[87]

Perhaps New York's reluctance to grant compensation in these cases is similar to the state's adherence to the impact rule in negligence litigation; if this is so, *Battalla v. State*,[88] in which New York rejected the impact rule in negligence, may be a possible hint of change in the future for Workmen's Compensation.[89]

It does seem somewhat ridiculous for the New York courts to recognize that emotional strains may have a very serious effect on the workman[90] and that he may truly suffer emotional injuries caused by his work,[91] and yet refuse to recognize that the combination of the two (*i.e.*, emotional strain causing mental injury) is compensable. There is no ground in the Workmen's Compensation Law itself upon which the courts can say that a combination of emotional cause with emotional effect is *not* an "accident." So long as the employee is able to prove that he has sustained an injury (and the courts have definitely recognized mental

83. *E.g.*, Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954); Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947); Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941).

84. Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 216, 176 N.E.2d 714, 718, 219 N.Y.S.2d 14, 19 (1961).

85. 361 Mich. 577, 106 N.W.2d 105 (1960).

86. See, *e.g.*, Bailey v. General Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955).

87. See, *e.g.*, Bekeleski v. O. F. Neal Co., 141 Neb. 657, 4 N.W.2d 741 (1942); Voss v. Prudential Ins. Co., 14 N.J. Misc. 791, 187 Atl. 334 (Dep't Labor, Workmen's Comp. Bur. 1936).

88. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (decided after *Chernin*, but before *Straws*).

89. N.Y. Workmen's Comp. Law § 11 states: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee. . . ." The "last preceding section" (§ 10) provides that the employer must pay compensation for injuries arising out of and in the course of employment. Since the Appellate Division has said that emotional injury caused by emotional stress is not a compensable injury, it would seem that § 11 would not preclude a civil suit by the employee against his employer (although in situations such as *Chernin* and *Straws* where no apparent fault was present the worker would probably have no cause of action). But this remedy evades the whole purpose of the Workmen's Compensation system, which is to compensate the injured employee without forcing him into litigation, where he is subject to the defenses of assumption of the risk and contributory negligence.

90. See *supra* notes 46-75 and accompanying text.

91. See *supra* notes 39-45 and accompanying text.

illness to be an injury),[92] that it was accidental (*i.e.*, met the suddenness requirements), and that it arose out of and in the course of employment, there seems to be no valid reason upon which the courts may deny compensation.

In the case of mental illness caused by emotional stress, there are some problems which may arise, but which, in light of the statute's specific directions as to when compensation should be granted,[93] should not enter into the determinations of the courts in this matter. The fact that a psychoneurotic reaction may not occur suddenly but may develop gradually could raise some problems of proof for the claimant.[94] It also may be difficult to determine if the injury was precipitated by his work.[95] Diagnosis and prognosis is very difficult and expensive and this may hinder the employee in bringing his claim.[96] These are problems which the legislature should consider in dealing with cases of mental injury caused by emotional stress, but they are certainly not a concern of the courts and should not be used sub silentio as a reason for denying compensation in such cases.

III. Conclusion

While the courts have made important progress in the field of heart attacks caused by prolonged emotional stresses (*e.g.*, *Klimas*) the time has passed for them to re-examine their positions on heart attacks (both those caused by emotional stress and heart attacks in general) and on psychoneurotic injuries precipitated by emotional causes. The Workmen's Compensation Law does not provide any sanction for the ordinary wear and tear rule nor for the refusal to compensate mental injury caused by emotional strains. The claimants in many of these heart cases and in one of the two reported emotional injury cases have proven to the satisfaction of the board (which due to its expertise has been authorized to determine the facts) that their injuries have arisen out of and in the course of employment and have been accidental in nature. It seems that the courts, in reversing these awards, have usurped both the function of the legislature and of the board.

If the courts refuse to re-evaluate their stands on these issues, it seems only proper that the legislature consider a modification of the Workmen's Compensation Law so that these claimants are not unjustly denied their compensation.

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92. *Ibid.*
93. N.Y. Workmen's Comp. Law §§ 2(7), 10.
94. Claimant, in a case such as Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960), may have difficulty meeting the suddenness requirements mentioned earlier (*supra* note 4 and accompanying text). It has been suggested that an employee might meet the suddenness requirement on a theory of minor repeated psychological impacts which taken in toto caused the injury. Comment, 11 Kan. L. Rev. 259, 263 (1962). The repeated minor impact theory has been rejected in New York in physical injury cases. See, Streindel v. Gorden Baking Co., 9 A.D.2d 798, 192 N.Y.S.2d 909 (3d Dep't 1959).
95. Comment, 70 Yale L.J. 1129, 1142 (1961).
96. *Id.* at 1134-35.