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Workmen's Compensation - Occupational Diseases - Radiation Injury Amendment

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RECENT LEGISLATION

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASES—RADIATION INJURY AMENDMENT—The Kansas Workmen's Compensation Act¹ has recently been amended to take more complete account of the complex nature of injuries which might arise through the increased use of radioactive materials and ionizing radiation. The effect of the amendment is twofold. First, it makes more inclusive the definition of radiation injury as an occupational disease by treating "exposure to ionizing radiation" as a cause of compensable injury.² Second, it removes all time limitation periods with regard to the giving of notice and the filing of claims and extends the general limitation period from one year from the date of disablement or death to three years from the termination of employment.³ *Kan. Laws* (1959) p. 479, c. 222, House Bill 390.

The expansion of the types of radiation injuries falling within the act has solved several possible problems, left some untouched, and created others. In its original form only injuries caused by "exposure to x-rays or radioactive substances" were included under the act.⁴ This could be interpreted to exclude exposure to neutron beams emanating from nuclear reactors, which are more strictly radiations from "fissionable substances."⁵ A similar problem would have arisen in the case of beams from high energy particle accelerators such as cyclotrons.⁶ The amendment's addition of the phrase "or exposure to ionizing radiation" as a cause of compensable injury clearly includes both these cases. A problem still unresolved, however, is whether "exposure to . . . radioactive substances" includes the taking of such substances internally.⁷ It can be argued with some force that the term

¹ Kan. Gen. Stat. Ann. (Corrick, 1949; and Supp. 1957) §44-501 et seq., §44-5a01 et seq.

² The Kansas act in §44-5a02 provides an exclusive list of compensable occupational diseases and, after amendment, treats radiation injury as follows: "(8) Diseased condition caused by exposure to X-rays or radioactive substances, or exposure to ionizing radiation. *'Ionizing radiation' means any process involving the use or direct contact with radium or radioactive substances or the use of or direct exposure to roentgen rays (X-rays) or ionizing radiation.*" (New matter italicized.)

³ The former §44-5a17 required that notice of occupational disease be given to the employer within 90 days after disablement or death, and also required that a claim for compensation be filed within one year after disablement or death. The following was added by the amendment: "The time limit prescribed by this section shall not apply in the case of an employee whose disablement or death is or was caused by latent or delayed pathological conditions, changes or malignancies due to the occupational exposure to X-rays, radium, radioactive substances or machines, or ionizing radiation: *Provided, however,* That no claims shall be allowed more than three years after the date of termination of employment by the last employer in whose employment exposure to ionizing radiation or radioactive substances or conditions causing the disease last occurred."

⁴ See note 2 supra.

⁵ See the discussion of a similar Texas statute [Tex. Civ. Stat. Ann. (Vernon, 1956) art. 3306, §20] in STASON, ESTEP AND PIERCE, *ATOMS AND THE LAW* 805 (1959).

⁶ *Ibid.*

⁷ See *id.* at 804-805. Illustrative is the ingestion of radium salts by painters of radium watch-dials. See *LaPorte v. U.S. Radium Corp.*, (D.C. N.J. 1935) 13 F. Supp. 263, and

"exposure" encompasses only injuries caused by substances outside the body, so that in such cases the applicability of the act is doubtful. The amendment not only adds the term "ionizing radiation" as a cause of compensable injury, but seeks to define it as well.⁸ The definition utilized appears to create more difficulties than it resolves. The amendment provides that "ionizing radiation means any process involving the . . . use of or direct contact with roentgen rays (X-rays) or ionizing radiation." Defining the term as a "process" appears to extend it beyond its ordinary sense. For instance, the electrocution of an employee by an x-ray machine used in an inspection "process" on an assembly line is apparently within this language, although obviously not within its purpose. Moreover, the definition of the words in terms of themselves is objectionable because of circularity.⁹ These difficulties, together with the fact that the term "ionizing radiation" has a somewhat established meaning,¹⁰ make the definition of doubtful value.

The need for the second part of the amendment¹¹ was obviously created by the peculiar nature of radiation injuries.¹² It is often months or years before the final effects of exposure to radiation become apparent,¹³ To avoid extinguishing the claim of injured persons before the fact of injury became known to them, the amendment removes all time limitations for the giving of notice and the filing of claims.¹⁴ It also extends the overall limitation period from one to three years, commencing with the termination of the last exposure-hazard employment.¹⁵ In cases involving occupational diseases the Kansas compensation statute begins the notice and claim periods with disablement or death.¹⁶ Since these facts will usually be as apparent in the case of latent radiation injury as in any other occu-

U.S. Radium Corp. v. Globe Indemnity Co., 13 N.J. Misc 316, 178 A. 271 (1935), *affd.* 116 N.J. L. 90, 182 A. 622 (1936).

⁸ See note 2 *supra*.

⁹ *Ibid.* A further defect in this definition is found in the conjunction "or" joining "radium *or* radioactive substances" and "roentgen rays . . . *or* ionizing radiation." This seems to indicate mutual exclusiveness and is thus misleading, for in each pair of words the latter term includes the former. The same difficulty arises in a similar alternative linking of "X-rays . . . *or* . . . ionizing radiation" in the main body of the statute.

¹⁰ Cf. STASON, ESTEP AND PIERCE, *ATOMIC ENERGY TECHNOLOGY FOR LAWYERS* 8 (1956).

¹¹ See note 3 *supra*. See, generally, 11 A.L.R. (2d) 277 (1950); STASON, ESTEP AND PIERCE, *ATOMS AND THE LAW*, Part II (1959); 2 LARSON, *WORKMEN'S COMPENSATION* §78 (1952).

¹² See Kan. Laws (1959) p. 542.

¹³ See STASON, ESTEP AND PIERCE, *ATOMIC ENERGY TECHNOLOGY FOR LAWYERS* 20 (1956).

¹⁴ See note 3 *supra*. For a survey of the notice and claim periods of various jurisdictions, see 2 LARSON, *WORKMEN'S COMPENSATION* 556-557, Table 19 (1952).

¹⁵ This limitation appears in §44-5a01, Kan. Gen. Stat. Ann. (Corrick, 1949; Supp. 1957). Although the amendment does not refer specifically to this overall limitation, nevertheless it seems clear that it is extended by the proviso therein. Since the limitation in §44-5a01 and that in the amendment's proviso both measure the periods from termination of the last exposure-hazard employment, any other conclusion would make the proviso ineffective and thus meaningless.

¹⁶ Kan. Gen. Stat. Ann. (Corrick, 1949; Supp. 1957) §44-5a17.

pational disease,¹⁷ the need for the removal of the limitations on the notice and claim periods is questionable.¹⁸ On the other hand, the extension of the overall limitation period from one to three years was gravely needed, because of the length of time which frequently passes before the effects of radiation injury appear.¹⁹ Indeed, several leading writers criticize insertion of any such absolute limitation in radiation cases, viewing the necessity of providing full compensation as a weightier consideration than putting to rest stale claims.²⁰

Perhaps the greatest deficiency of the present amendment lies in its failure to deal with one of the most serious problems to be anticipated through the increased use of radiation and radioactive materials: that is, what constitutes a "diseased condition" compensable under the act? The changes in the body which can result from ionizing radiation are subtle and varied.²¹ If the sole effect of exposure were a shortened life span would a "diseased condition" be present?²² What of increased susceptibility to disease,²³ or a psychosomatic disturbance resulting from fear of radiation

¹⁷ The difficulties often encountered where recourse for compensation must be had to the accident provisions of these statutes are not present in claims based on occupational disease. See 2 LARSON, WORKMEN'S COMPENSATION §78 (1952). For claims based on accidental injury or death many statutes generally commence their limitation periods with the date of the "accident." These are ordinarily strictly construed with the result that many latent injuries are often barred by the limitation periods. *Id.*, §78.40; *Rutledge v. Sandlin*, 181 Kan. 369, 310 P. (2d) 950 (1957). Other such statutes begin their limitation periods with the time of the "injury." These have been so construed that their limitation period does not commence until the claimant reasonably should recognize the nature, seriousness and probable consequences of his disease. 2 LARSON, WORKMEN'S COMPENSATION §78.40 (1952).

¹⁸ Although there are indications that where the occupational origin of the injury is unknown there may be no "disablement" to start the running of the limitation period, the problem is not settled. Compare *Roschak v. Vulcan Iron Works*, 157 Pa. Super. 227, 42 A. (2d) 280 (1945), discussed approvingly in 2 LARSON, WORKMEN'S COMPENSATION §78.52 (1952), with *Raymond v. Industrial Commission of Ohio*, 140 Ohio St. 233, 42 N.E. (2d) 992 (1942). See STASON, ESTEP AND PIERCE, ATOMS AND THE LAW 838-839 (1959). On this ground there might be some merit in the amendment's suspension of notice and claim limitations in radiation cases, where the symptoms are often ambiguous.

¹⁹ See cases cited in note 7 *supra*. See also Lang, "A Most Valuable Accident," *THE NEW YORKER* 49-87 (May 2, 1959). Such absolute limitations are not readily construed to provide exceptions or suspensions in cases of latent injury. Cf. *Weissgerber v. Industrial Commission*, 242 Wis. 181, 7 N.W. (2d) 415 (1943); 2 LARSON, WORKMEN'S COMPENSATION §78.52 (1952).

²⁰ See Leonard, "The Atomic Age and Workmen's Compensation," 1958 A.B.A. PROCEEDINGS SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 75-82. See also STASON, ESTEP AND PIERCE, ATOMS AND THE LAW 842-843 (1959), pointing out that in atomic energy employments employers typically keep records of employee exposure and hence are not faced with the necessity of making initial investigations long after the events causing the injury when witnesses and information are unavailable.

²¹ See STASON, ESTEP AND PIERCE, ATOMIC ENERGY TECHNOLOGY FOR LAWYERS, c. 1 (1956).

²² Proof would be difficult, but this is certainly a probable effect of ionizing radiation. See *id.*, p. 31. Larson states that the term "disease" is generally construed in its broadest dictionary meaning of "any serious derangement of health" or "disordered state of an organism or organ." 2 LARSON, WORKMEN'S COMPENSATION §41.40 (1952).

²³ In this situation the "ordinary diseases of life" limitation would pose an additional hurdle. This limitation is found in Kan. Gen. Stat. Ann. (Corrick, 1949; Supp. 1957)

injury?²⁴ Would malformation of an irradiated fetus constitute a "diseased condition" in the mother?²⁵ Are genetic changes in the gametes of the worker which result in mutated offspring such a condition? And what of accumulating a sufficient dose of radiation that further pursuit of a radiation-hazard occupation is unsafe?²⁶ Clearly, the onset of the atomic age merits a re-examination of this aspect of the workmen's compensation problem.

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§44-5a01, which allows compensation for a disease only if "to the occupation in which the employee or workman was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run of occupations and is in excess of the hazard of such disease attending employment in general." See 2 LARSON, WORKMEN'S COMPENSATION §41.50 (1952) for a discussion of the operation of such limitations.

²⁴ Compare *Bramble v. Shields*, 146 Md. 494, 127 A. 44 (1925) (claimant developed neurasthenia in the form of a conviction that injured bones were decaying; neurosis held compensable) with *Liscio v. Makransky & Sons*, 147 Pa. Super. 483, 24 A. (2d) 136 (1942) (shock resulting from flash of lightning held not compensable, physical impact being required). But see *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E. (2d) 291 (1941), where disabling neurosis resulting from electric flash was held compensable. Where "impact" is required for a compensable injury there might be some doubt whether radiation is a sufficient "impact."

²⁵ See STASON, ESTEP AND PIERCE, *ATOMIC ENERGY TECHNOLOGY FOR LAWYERS* 28 (1956).

²⁶ Some of these cases, even if considered a "diseased condition," will not necessarily be disabling and therefore under Kan. Gen. Stat. Ann. (Corrick, 1949; Supp. 1957) §44.5a01 might not be compensable. For an argument that workmen's compensation coverage should include these cases, see Leonard, "The Atomic Age and Workmen's Compensation," 1958 A.B.A. PROCEEDINGS SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 75-82.