Cleveland State Law Review

Volume 17
Issue 1 *Workmen's Compensation (Symposium)*

Article 10

1968

Aggravation under Workmen's Compensation

Allyn D. Kendis

James D. Kendis

Aggravation Under Workmen's Compensation

*Allyn D. Kendis and James D. Kendis**

WORKMEN'S COMPENSATION has been defined as a system of social legislation providing compensation for loss resulting from the disablement or the death of workmen through industrial accident, casualty or disease.[1] This definition, however, over-simplifies an area which has been subject to constant change by both the Ohio General Assembly and the Ohio Courts.[2] Recovery for an injury sustained in a workmen's compensation case is dependent upon the existence of all of the following six factors: (1) Jurisdiction of the subject matter;[3] (2) Amenability of employer;[4] (3) Proof of contract of employment;[5] (4) Showing of a work related occurrence;[6] (5) Sustaining of an injury as defined under the Workmen's Compensation Act;[7] and (6) Proof of a causal relationship between the disabling condition and the injury received whether by direct causation, acceleration or by aggravation.[8] It is this last area and especially the question of causation through means of acceleration or aggravation which warrants further discussion and examination.[9]

Acceleration and Aggravation

Background. Benefits in a workmen's compensation case can be paid to an injured employee, or his dependents in case of death, only when it can be shown that his disability or death is the direct and proximate result of an accidental injury or occupational disease.[10] Statutory authority for this requirement can be found in Section 4123.54, of the Revised Code of Ohio, where the statute requires payment of compensa-

---

* Of the Ohio Bar, members of the law firm of Shapiro, Kendis & Petro, of Cleveland, Ohio.

1 58 Ohio Jur. 2d, Workmen's Compensation § 1 (1963).

2 The original Workmen's Compensation Act was enacted in 1911 and made a part of the Ohio Constitution in 1912. Ohio Const. art. II, § 35 (1912).

3 Ohio Rev. Code § 4123.54.

4 Ohio Rev. Code § 4123.37.

5 See Young, Workmen's Compensation Law of Ohio § 4.1 (1963). See also Coviello v. Industrial Commission, 129 Ohio St. 589, 196 N.E. 661 (1935).

6 Ohio Rev. Code § 4123.01(c). See also Young, *op cit. supra* note 5, at § 5.5-22.

7 *Ibid.*

8 See Ohio Rev. Code *supra* note 3, .59. See also *e.g.*, McKee v. The Electric Auto Lite Co., 168 Ohio St. 77, 151, N.E.2d 540 (1958).

9 Very little has been written on this important area. For the best available material on this area see Tatgenhorst, Proximate Cause—Aggravation and Acceleration, Reference Manual for Continuing Legal Education Program—Workmen's Compensation Conference 39 (1964).

10 See Young, *op. cit. supra* note 5, at § 6.3.

tion *on account* of the injuries[11] and in Section 4123.59, R.C., where the statute reads that payment shall be made to a dependent if an injury or occupational disease *causes* death.[12]

The term proximate cause was defined in the early case of *Aiken v. Industrial Commission,*[13] in this way:

> The definition and determination of "proximate cause" in the field of torts is applicable here. While the determination of the proximate cause of an ultimate result sometimes presents a difficult problem in a particular case, general principles controlling the settlement of such questions are well established. Briefly stated, the "proximate cause" of an event is that which is a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.[14]

It also was held very early that the plaintiff must establish the proximate relationship between injury and disability[15] and that furthermore, proof in a workmen's compensation case must be in the realm of probabilities and not mere possibilities.[16]

A leading case on the type of proof necessary to establish proximate cause in the workmen's compensation area is *Fox v. Industrial Commission.*[17] There the court discussed proximate cause and held that any form of possibility was insufficient to sustain the burden of proof. Possibility meant speculative evidence and not substantial proof of sufficient weight of evidence to warrant a court to allow a matter to go to the jury.[18]

Accordingly, the courts have required substantial proof of a direct and proximate causal relationship. Anything less would be insufficient. Proof of the result is only one way to prove a workmen's compensation case. Another way is by the use of the doctrine of aggravation and acceleration. This doctrine is complicated and its use is somewhat difficult in light of a series of 1958 and 1959 Supreme Court decisions,[19] but is of sufficient importance that it must be known and recognized.

Definition. While many attempts have been made to define the doctrine of aggravation and acceleration, perhaps the following is one of the most comprehensive:[20] "An award may be had for disablement or

---

11 Ohio Rev. Code, *supra* note 3.
12 Ohio Rev. Code § 4123.59.
13 143 Ohio St. 113, 53 N.E.2d 1018 (1944).
14 *Id.* at 117, 1020.
15 Industrial Commission v. McWilliams, 126 Ohio St. 508, 186 N.E. 97 (1933).
16 Drakulich v. Industrial Commission, 137 Ohio St. 82, 27 N.E.2d 932 (1940).
17 162 Ohio St. 569, 125 N.E.2d 1 (1955).
18 *Ibid.* See also Young, *op. cit. supra* note 5, at § 6.3.
19 *Infra* notes 42 to 59.
20 *Supra* note 1 at 210.

death resulting from injury which aggravates an existing disease or infirmity or which accelerates it to a mortal end or to a point of disablement sooner than it would otherwise have come." [21] This definition, however, while it sets forth the theory behind the law, namely compensating an injured employee for a worsening of a pre-existing condition, does not express the law as it apparently exists today.

Origin of Theory. It is interesting to note that there is no definite provision for the aggravation and acceleration theory either in the Ohio Constitution[22] or in the statutes.[23] Article II, Section 35 of the Ohio Constitution provides only for "compensation to workmen and their dependents for death, injuries or occupational disease occasioned in the course of such workmen's employment. . . ." [24] Section 4123.54 of the Ohio Revised Code likewise provides: "Every employee, who is injured or who contracts an occupational disease and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury occurred or occupational disease has been contracted . . . is entitled to receive . . . such compensation." [25] Despite this absence of specific authority, the courts of Ohio and elsewhere have read into the workmen's compensation and personal injury law this all important doctrine. The apparent rationale, adopted by the courts, is that in every death caused by wrongful acts or accidental injury there really is some change of nature, be it aggravation or acceleration.[26]

The Ohio courts have accepted the aggravation and acceleration doctrine for some time.[27] In a series of early court of appeals decisions,[28] the doctrine was set forth and even treated as a well accepted part of the law. However, the case which is credited with the adoption of the acceleration part of the theory into the Ohio Workmen's Compensation law is the 1932 decision of *Weaver v. The Industrial Commission.*[29] There, the Ohio Supreme Court without syllabus and without citing any Ohio authority or rationale, set forth that compensation would be granted if there was an acceleration of death provided such acceleration was the

---

[21] *Ibid.*

[22] Ohio Const., *supra* note 2.

[23] Ohio Rev. Code § 4123.01-99.

[24] Ohio Const., *supra* note 2.

[25] Ohio Rev. Code, *supra* note 3.

[26] See Larrissey v. Norwalk Truck Lines, 155 Ohio St. 207, 98 N.E.2d 419 (1951).

[27] See 42 Ohio Jur., Workmen's Compensation § 61, at n. 4 (1936).

[28] Industrial Commission v. Gillard, 410 Ohio App. 297, 179 N.E. 514 (1931); Industrial Commission v. Bowshire, 41 Ohio App. 79, 179 N.E. 809 (1931); Rosichan v. Hoose, 40 Ohio App. 25, 177 N.E. 843 (1931); Industrial Commission v. Betleyoun, 31 Ohio App. 430, 166 N.E. 381 (1929).

[29] 125 Ohio St. 465, 181 N.E. 894 (1932).

proximate result of the injury.[30] The only basis given for the court's decision of accepting this doctrine was a series of Illinois cases.[31]

As the *Weaver* case only mentioned acceleration, it was thought by some that the Supreme Court had impliedly overruled the earlier court of appeals decisions which accepted the theory of aggravation. However, in 1933, the Supreme Court in another per curiam decision, *Industrial Commission v. Gotshall,*[32] reversed a trial court for refusing to charge a jury on an aggravation of a pre-existing condition. The court seemed to imply that acceleration and aggravation were to be treated as being synonymous and that perhaps they were synonymous in meaning.[33]

Refinements of the Doctrine. After *Gotshall,* the aggravation and acceleration doctrine met with some refinements and added requirements. In 1935, the Supreme Court set forth that an aggravation or acceleration of an existing condition must be the proximate result of an injury[34] and furthermore, that the injury must be the proximate result of the resulting incapacity or death.[35] In addition, in *Ackerman v. Industrial Commission,*[36] the Supreme Court added that not only must one show that there was an acceleration or aggravation of a disease, but also that such diseased condition was existing at the time of the injury. Without the first showing of the proof of existence of the disease, all proof as to acceleration is incompetent. Again, in 1948, the Supreme Court reiterated that proof of an accidental injury within the contemplation of the Workmen's Compensation Act, which causes the acceleration or aggravation, is still a vital necessity.[37]

The underlying basis that precipitated this doctrine is that every claimant is accepted as he is, no matter what his physical condition and if that condition is worsened, even in a small part, then the claimant is entitled to participate fully in the Workmen's Compensation Fund.[38] Unlike personal injury actions where a weakened condition can be used to mitigate damages, all that needs to be proven in the workmen's compensation case is an aggravation or acceleration of an existing condition whether non-disabling or partially disabling into a worsened condition

---

[30] *Ibid.*

[31] West Side Coal & Mining Co. v. Industrial Commission, 321 Ill. 61, 151 N.E. 593 (1926); Springfield Dist. Coal Mining Co. v. Industrial Commission, 303 Ill. 455, 135 N.E. 789 (1922).

[32] 127 Ohio St. 295, 188 N.E. 5 (1933).

[33] *Ibid.*

[34] Industrial Commission v. Owens, 50 Ohio App. 481, 198 N.E. 603 (1935).

[35] Ackerman v. Industrial Commission, 131 Ohio St. 371, 3 N.E.2d 44 (1936).

[36] *Ibid.*

[37] Nelson v. Industrial Commission, 150 Ohio St. 1, 84 N.E.2d 430 (1948).

[38] Industrial Commission v. Palmer, 126 Ohio St. 251, 185 N.E. 66 (1933); Williams v. Industrial Commission, 95 Ohio App. 275, 119 N.E.2d 126 (1954).

or death. With proof of this type, the claimant has a right to participate in the state insurance fund.[39]

Some states found this idea to be unfair and enacted provisions to mitigate the award based on the extent of the prior condition.[40] Ohio never formally adopted such a provision but in 1958, seemed to change part of the doctrine to reflect this mitigation idea by adding requirements to the doctrine of acceleration as it was set forth from the earliest cases.[41]

Post 1958 Decisions. There has never been any clear cut line of demarcation by the courts between the use of the word aggravation and the word acceleration. At times these words have been treated by the courts as being synonymous in effect. However, acceleration has been consistently used in the sense of a hastening of death and aggravation as a worsening of a condition. It is this minor differential which has been grasped upon by the courts and which has caused acceleration cases to be judged in a different light from aggravation cases.

The apparent reason for a change of test in this area was the difficulty of proving a causal relationship between injury and resulting death.[42] Cases[43] arose with proof only of a remote and indefinite causal relationship and the courts seemingly felt that the vague relationship failed to sustain the burden of proximate cause and began to insist on definite proof of a more substantial nature as to the accelerating of a diseased condition to death.

The first instance of this firming trend appeared in the Ohio Supreme Court decision of *McKee v. Electric Auto-Lite Company.*[44] There the court was faced with a situation of a man sustaining a deep laceration of a finger which caused an aggravation of a pre-existing arteriosclerosis from which the workman died. When faced with a causal relationship, the court said:

> If we are to continue to hold, despite no provision therefor in the statute, that death from a pre-existing cause and accelerated by an accidental injury is compensable as a death claim under the statute, there must be a substantial causal relationship between the accident and the accelerated death, and such relationship cannot be proved by mere magic words of direct causation without evidence to definitely support it.[45]

---

[39] State v. Morse, 157 Ohio St. 288, 105 N.E.2d 251 (1952).

[40] See 1 Larson's Workmen's Compensation Law § 12.20, at 192.47 n. 54 (1966).

[41] *Supra* notes 29 to 33.

[42] See *e.g.*, McKee v. The Electric Auto Lite Co., 168 Ohio St. 77, 151 N.E.2d 540 (1958).

[43] See *e.g.* Senvisky v. Truscon Steel Div. of The Republic Steel Corp., 168 Ohio St. 523, 156 N.E.2d 724 (1959).

[44] 168 Ohio St. 77, 151 N.E.2d 540 (1958).

[45] *Id.* at 82, 151 N.E.2d at 544.

The court, however, was not content in merely mentioning the need for a definite causal relationship, but also went on to explain the test or rule which must be followed:

> We are of the opinion . . . that there can be no recovery without an acceleration by an appreciable and substantial period of time.
>
> A careful perusal of the testimony of plaintiff's expert witness, which is the basis for the claim in the present case, demonstrates beyond the pre-adventure of a doubt that such witness could not and did not give any evidence as to a substantial traumatic acceleration of the death. . . .[46]

Accordingly, the court seemed to require a "substantial traumatic acceleration," and that being anything less would not demonstrate a causal relationship. The *McKee* court based its rationale on the syllabus of the wrongful death case of *Lopresti v. Community Traction Company.*[47] In *Lopresti,* the court simply held there was no substantial evidence that the injury of the decedent shortened his life any appreciable period of time, meaning that the plaintiff had not proved an acceleration. However, when this fact was stated in the syllabus, the idea of proximate cause was not clearly spelled out.

> In a wrongful death action where it is claimed that the death was accelerated by the wrongful act of the defendant, recovery can be had only where it is shown by the evidence that death was accelerated by an *appreciable period of time as a direct result of the wrongful act.*[48]

The *McKee* court read this syllabus to mean that a "substantial acceleration" must be present to justify a way to say that proximate cause had not been proven. Accordingly, a new element was added to the acceleration doctrine.

In that same year, in the case of *Senvisky v. Truscon Steel Div. of The Republic Steel Corporation,*[49] the court clarified the meaning of this new requirement by saying:

> It would seem that when we hold that death from a pre-existing disease is compensable where it is substantially accelerated directly because of a compensable injury, we are virtually stating in another manner that the injury is the proximate cause of death.[50]

However, in the syllabus, *McKee* was approved and followed and the test was slightly changed to "death was accelerated by a substantial

---

[46] *Id.* at 82, 83, 151 N.E.2d at 544, 545.
[47] 160 Ohio St. 480, 117 N.E.2d 2 (1954).
[48] *Id.* at 480, 117 N.E.2d at 2. (Emphasis added).
[49] Senvisky v. Truscon Steel Div. of The Republic Steel Corp., *supra* note 43.
[50] *Id.* at 530, 728.

period of time as a direct and proximate result of such accidental injury." [51] This test was again restated in the per curiam opinion of *Meese v. Wylie*.[52]

The natural question which must arise is what do the courts mean when they require "an acceleration by a substantial period of time as a direct and proximate result of such accidental injury." There can be two possible interpretations. The first would be that a death must be by acceleration by many weeks, months or even years before a recovery can be granted. Further, that the judging of this time must be made by a jury. This interpretation, however, lacks logic and is contrary to the spirit of the Workmen's Compensation Law. The Workmen's Compensation Law is designed to compensate an employee, or his dependents, for a condition which arises due to an accidental occurrence, whether such occurrence contributes to his condition in part or in whole, as long as it directly and proximately contributes.[53] Also, Ohio has never allowed any form of mitigation of damages for pre-existing injuries in workmen's compensation.[54] But if a jury is to judge whether there is or is not a *substantial* acceleration, a mitigating factor has been allowed to creep into the law.[55]

The second possible interpretation that can be given to this section is that a substantial period of time is the court's test of proximate cause.[56] In other words, there must be a clear and definite causal relationship between an injury and a death as can be clearly shown by a hastening of death. Without the hastening of death by a period of time that can be shown, the plaintiff has failed to sustain his burden of proving a direct and proximate cause.

While at first blush these interpretations seem to mean the same thing, a closer examination shows that each is a different approach. If a jury is told to look for an acceleration by a substantial period of time as a direct and proximate result of such injury, the amount of time or the definite amount of acceleration becomes the foremost issue or point. But, if the jury is instructed to look to the causal relationship between the injury and death with the acceleration of the death by a period of time as evidence of this causal relationship, then the emphasis is where it should be in a workmen's compensation case. The *Senvisky* court

---

[51] *Id.* at 523, 724.

[52] Meese v. Wylie, 169 Ohio St. 252, 158 N.E.2d 891 (1959).

[53] Industrial Commission v. Palmer, 126 Ohio St. 251, 185 N.E. 66 (1933); Hamilton v. Keller, 11 Ohio St. 2d 121, 229 N.E.2d 63 (1967).

[54] State v. Morse, *supra* note 39.

[55] In every case, a jury may somewhat weigh the claimant's negligent acts in determining whether to allow a claimant to participate in the Workmen's Compensation Insurance Fund. But in this situation, the jury is given an actual choice as a part of their jury duty.

[56] See Senvisky v. Truscon Steel Div. of The Republic Steel Corp., *supra* note 43.

seemed to say that the proximate cause approach is what was intended, but as these terms have been used over and over the original theory has been lost.

Conceivably, a jury or court could now find that there was a causal relationship between an injury and the proximate death, and that this was a clear acceleration by six to eight months, but that this was not a substantial acceleration and deny recovery. Such a decision and interpretation would require a greater degree of proof in a workmen's compensation case than it would in a comparable personal injury case where recovery could be allowed but with mitigation of the damages. It would seem, therefore, that the Supreme Court of Ohio intended this second approach—namely substantial acceleration as proof of a direct and proximate cause. Under this approach, the exact time of an acceleration becomes unimportant.

The recent Court of Appeals case of *Thomas v. Keller*[57] would seem to back up the second interpretation mentioned above. There the Court of Appeals mentioned that the evidence in an acceleration case need not show the precise period of acceleration. It is sufficient that an expert states that there was an acceleration. This decision was made because of the natural consequences of the *McKee* and later decisions—a feeling that the exact time of acceleration was important as opposed to its use in determining proximate cause.

Aggravation v. Substantial Acceleration

It is indeed interesting that in *McKee* and later decisions the requirement of "substantial" was not also carried over to aggravation. It would seem that the courts do not feel that a workman must prove a substantial aggravation. It is sufficient that he can show by competent testimony and medical evidence that his diseased condition is worsened. However, if that workman dies, the question of proof becomes more difficult. In that respect, one must show that the death was hastened as a result of an injury and this is where evidence must include a proximate relationship which is obviously missing without a showing that the deceased workman would have lived longer but for the accident.

It is because of this difference in proof that the tests have been changed. But until the courts again clarify their rationale, the area will be subject to additional litigation and difficulties.

Aggravation of Industrial Injury by Unrelated Conditions

At times an unrelated disability can and does interfere with an injured workman's recovery. Often, in fact, it is necessary that such an unrelated condition, which previously did not require treatment, will need care in that it hampers the improvement of the claimant's work-

[57] 9 Ohio App. 2d 237, 224 N.E.2d 165 (1967).

related injury. This previous condition is not aggravated or accelerated, but now requires treatment.

In order to cover such a contingency, the Bureau of Workmen's Compensation issued a rule or procedure, entitled, "Treatment of Unrelated Conditions." [58] It reads:

> The Bureau of Workmen's Compensation will pay for treatment of a condition which is unrelated to the injury as long as it is clearly evident that the unrelated condition is aggravating the industrial injury, the responsibility of the Bureau of Workmen's Compensation ceases and payment for any subsequent treatment that may be given will be claimant's own responsibility.[59]

Disabilities Producing New Disabilities

A related subject, which comes close to the area of aggravation, is disability from industrial injuries which cause new disabilities. An example would be where a man breaks a leg and while walking with his cast he trips and injures his arm. A similiar situation would be where an injured person, receiving medication, sustains a reaction from the medication and further disability. Such new conditions are considered directly related to the industrial injury and compensation and medical will be paid. The case which advanced this theory was *State ex rel. Pyles v. Industrial Commission.*[60]

Summary

Workmen's compensation law has always required the proof of a causal relationship between an accident and subsequent injury. This proof can be shown by means of a direct relationship or by means of the doctrine of aggravation and acceleration. When using the latter doctrine, one must be careful to follow the mandates of the Supreme Court of Ohio. In aggravation cases, it is necessary to prove not only the usual workmen's compensation elements of jurisdiction amenability, employment, work-relationship and accidental injury, but also a pre-existing disease which has been directly and proximately aggravated by an accidental injury. This aggravation can be slight or great, as long as it can be proven by competent medical evidence.

In acceleration cases, the Supreme Court has added certain requirements over and above those mentioned for aggravation situations. In such situations, it is often extremely difficult to show by competent evidence that an accidental injury has hastened an injured workman's death. For this reason, the Ohio Supreme Court has required a sub-

---

[58] Medical Handbook, Physicians—Rules of Procedure No. 25, at 18 (1965).

[59] *Ibid.*

[60] 132 Ohio St. 384, 7 N.E.2d 800 (1937).

stantial degree of proof which can only be satisfied by showing that a pre-existing disease was substantially accelerated. However, the law does not seem to require any specific period of time to prove a substantial acceleration, but instead only sufficient time as to convince a court or jury that there is a direct and proximate causal relationship between the alleged injury and the subsequent hastening of death.

Being that this area is one which has been subject to constant court change and re-evaluation, it might be a worthwhile idea for the Ohio Legislature to enact positive law setting forth the exact use and meaning of the aggravation and acceleration doctrine. However, until such a proposition is introduced and passed, the practitioner must follow each and every decision in this area with caution.