McGeorge Law Review

Volume 2 | Issue 2 Article 11

7-1-1971

Workmen's Compensation--Diseases Arising Out of Employment--A Problem of Proof

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Workmen's Compensation -- Diseases Arising Out Of Employment-- A Problem Of Proof

Through effective lobbying, the fire fighting and law enforcement professions succeeded in causing the introduction of legislation to create a conclusive presumption of work relationship to heart disease for these specific occupational groups. These professions already enjoy rebuttable presumptions that heart disease is work related but one wonders if the proof of the disease-work relationship is a problem peculiar to these professions. This comment explores the development and purposes of workmen's compensation to determine if the basic concepts are validly applied in relation to diseases. Through an analysis of the cases, the existence of a wide-ranging problem concerning the effect of the presumptions is shown and an attempt is made to examine alternative solutions.

Heart disease is recognized by nearly everyone as a major problem in our society, and this may explain in part the rather curious legislative proposal before the 1970 Regular Session of the California Legislature. Senate Bill 763 would have added section 3213 to the Labor Code, creating a conclusive presumption that heart trouble which develops or manifests itself in certain fire fighting and law enforcement employees is work-related. The presumption would begin its existence when this class of employee had served 10 years or more in the profession on a full time basis. Presently there are provisions for rebuttable presumptions with respect to heart trouble, pneumonia and hernia in favor of these professions,[1] but interestingly, there are no similar provisions to be found to favor any other class of workers.[2] The magnitude of the problem of heart disease does not explain the narrow scope of this proposal or the existing presumptions. It may be more adequately explained by the existence of strong special interest groups which have often been successful in obtaining greater benefits than similarly situated individuals.[3]

1. CAL. LABOR CODE §§ 3212, 3212.5.
2. CAL. LABOR CODE §§ 3201-6149.
3. Some of the more recent examples of legislation introduced for the benefit of

Under heavy attack from medical experts, S.B. 763 met its demise in the Industrial Relations Committee as did its predecessor, S.B. 208.[4] In spite of its failure, the bill raises some interesting questions regarding the burden of proof which must be carried by the applicant: Is workmen's compensation fulfilling its original purposes as it relates to diseases? Does the usual applicant find it difficult to sustain the burden of proof in disease cases? Would a presumption aid him? Is there a problem peculiar to law enforcement and fire fighting employees which warrants a special presumption?

In the remainder of this article, these questions will be answered

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selected special groups of employees where the actual justification is of some question are:

1. S.B. 218, 1969 Regular Session. This bill proposed to amend Labor Code § 4800 to permit State Drivers License Examiners to have up to 12 months of leave with full pay for on the job injuries. Such a benefit is provided to uniformed members of the California Highway Patrol. Proponents argued that the work of a Drivers License Examiner was comparable to that of a law enforcement officer. In fact, the rate of on the job accidents for Drivers License Examiners was no greater than for most other state civil service employees and significantly less than State highway maintenance men. Time lost per accident for DLE's averaged four days during 1968.
2. A.B. 1587, 1969 Regular Session, CAL. STATS. 1969, c. 1516: This bill was enacted to include State Lifeguard employees in a special law enforcement category to permit them special retirement benefits. Such benefits provide approximately 2% of base earnings per year of state service upon retirement. Regular State employees receive approximately 1% per year of service. It is just a slight stretch of the imagination to consider a lifeguard to be comparable to uniformed police and other law enforcement employees. This benefit has not been provided for State watchmen and guards.
3. Assembly Concurrent Resolution 127, 1970 Regular Session. This resolution stated that the salaries for State Correctional Officers and Group Supervisors was far behind those salaries paid by other federal and local government agencies and that special consideration should be given to correcting this salary inequity. Significantly, studies by the State Personnel Board conducted on behalf of these employees during the last few years clearly indicate that they receive a salary rate comparable to the highest paid correctional employees in Federal and local government.

Further examples of this type of legislation are apparent in the 1971 Regular Session where several bills have been introduced which would affect Labor Code sections 3212 and 3212.5. They generally do no more than attempt to add certain interest groups to those already enjoying the presumptions:

1. S.B. 540, 1971 Regular Session, seeks to include specified psychiatric technicians within the purview of the presumptions.
2. S.B. 598, 1971 Regular Session, would create a presumption in favor of certain county and state probation and correction officers. It would be essentially the same as the presumption presently in force except it would add tuberculosis to the list of diseases covered.
3. A.B. 226, 1971 Regular Session, would include specified University of California firemen within the disputable presumptions with regard to heart trouble, pneumonia and hernia.
4. A.B. 227, 1971 Regular Session, if enacted would include specified University of California police department members within the presumptions with regard to heart trouble and pneumonia.
5. A.B. 240, 1971 Regular Session, would include California State Police within the presumption relating to heart disease and pneumonia.
6. A.B. 244, 1971 Regular Session, attempts to include both California State Police and University of California police within the purview of the existing presumptions.

4. S.B. 208, 1969 Regular Session, was worded exactly as S.B. 763 and was also introduced by Senators Marks and Moscone.

so as to show that this legislation is an inadequate response to the pressures of a strong special interest group. Through a survey of the historical development of workmen's compensation, its underlying theories and its difficulty with diseases it will be shown that workmen's compensation has failed to meet many needs in this area. The need is not, however, limited to any special class of civil service employee.

HISTORICAL EVOLUTION AND PURPOSE OF WORKMEN'S COMPENSATION

At early English common law there was no distinction between the duty of care owed by a master to his servant or to strangers. Work related injuries were generally covered by the tort action of negligence.[5] Workmen's compensation laws evolved slowly, since under the system of craftsmen, small shops and the master-servant apprenticeship, the need was not great.[6] The Industrial Revolution, however, brought about great changes; workers amassed in large factories, exposure to often hazardous machines, impersonal relationships with employers (often corporations), lack of training and skills, and exposure to unsafe and unhealthy working conditions.[7] Under these circumstances, the principle of negligence failed to offer an adequate remedy to the worker. The employees were subjected to increased hazards and likelihood of harm, but the employer's duty was limited to reasonableness in all respects and he was definitely not the insurer of his employees' safety. The servant, faced with the problem of proving negligence, was also subject to the defenses of contributory negligence, the fellow-servant rule, assumption of the risk, and his own wilful misconduct.[8]

Workmen's Compensation Evolves

The first attempts to alleviate some of these problems came in the form of employer's liability acts. In 1846, Lord Campbell's Act, a death statute which provided a remedy for wrongful death, was enacted, allowing the families of deceased employees to collect from the employer for the first time in history.[9] In 1880, England adopted the first Employer's Liability Act which essentially modified common law concepts to put the employee in the same position as that of a stranger on the premises. It was rather ineffective, since it only modified or dis-

5. W. HANNA, THE LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION, Vol. 2 *Principles*, at 3 (1954). [Hereinafter cited as HANNA].
6. *Id.*, the minor importance of industry, simple tools, skilled workers, closer relationships and fewer hazards contributed to this lack of need.
7. *Id.*
8. *Id.* at 4-6.
9. *Id.* at 7.

allowed some of the common law defenses open to the employer and the courts held that a contract waiving the employee's rights under the act was not against public policy.[10] Between 1880 and 1910, various Employer's Liability Acts, patterned after and very similar to the English were enacted in various countries and most of the states.[11]

These Employer's Liability Acts, although a step toward liberalization, fell far short of meeting the needs of the worker. Beginning in Europe (1885-1906), the workmen's compensation laws began to evolve.[12] Constitutional problems, opposition from lawyers and employers, and reluctance of individual states to be first, thereby putting themselves at an economic disadvantage, contributed to slower action on the part of the United States.[13] The United States began to follow the workmen's compensation trend around 1902 and by 1911 many of the states had enacted some form of workmen's compensation legislation. The last state to fall in line, however, did so in 1949.[14]

California's first attempt at workmen's compensation legislation was the Roseberry Act of 1911, which found little acceptance among employers.[15] In 1913, following an amendment to the state constitution to allow for a complete system of workmen's compensation, California enacted a compulsory law,[16] which was amended in 1915 to substitute "injury" for the word "accident."[17] In 1917, it was again amended and many of the provisions of the 1913 law were reenacted. The Workmen's Compensation Act as amended in 1917 is essentially in effect today.[18]

Philosophy Behind Workmen's Compensation

Workmen's compensation is based both on social and economic considerations. The social bases stem primarily from considerations of public policy.[19] Probably the two major considerations were (1) the distress and economic insecurity being thrust on numerous victims of industrial accidents as a result of inadequate legal remedies, and (2) the state's interest in doing the greatest good for the greatest number of people through the abolition of the fault concept.[20]

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10. *Id.* at 8.
11. *Id.* at 9-10.
12. *Id.* at 11-12.
13. *Id.*
14. *Id.* at 12-13.
15. CAL. STATS. 1911, c. 399, §§ 1-31, pp. 796-806. *See also* HANNA at 13.
16. CAL. STATS. 1913, c. 176, §§ 1-92, pp. 279-320. *See also* HANNA at 13.
17. CAL. STATS. 1917, c. 586, §§ 1-74, pp. 831-879. *See also* Swezey, *Disease as Industrial Injury in California,* 7 SANTA CLARA LAW. 205 (1967).
18. HANNA, at 13-14.
19. *Id.* at 14.
20. *Id.*

The major theories underlying the economic basis of workmen's compensation are;

> (1) the risk of injury and financial burden resulting therefrom should be borne by industry as a whole rather than fall solely upon the employee involved, and (2) the burden of the wearing out and destruction of human, as well as inanimate machinery, should be borne by industry just as other costs of production are assumed by the employer and ultimately passed on to the public.[21]

It has been said that

> [w]orkmen's compensation is not a form of charity intended to exclusively benefit the worker. It is a socially enforced bargain: the employee giving up the increasingly valuable right to recover a large judgment for the certainty of a small but adequate award; the employer giving up a right to defend, but gaining the assurance that recovery ordinarily will not financially endanger his business. . . .[22]

Historical Difficulty with Diseases

The workmen's compensation laws have struggled with the problem of compensability of diseases from the beginning, and the evolution to include all work-related diseases has been slow and incomplete.[23] The first English legislation specifically included six named diseases, however most of the American laws originally referred only to injuries caused by "accident."[24] This restrictive language in the original American acts caused confusion and uncertainty as to what type of injury was compensable.[25] In the early years, the courts seemed to be split between a narrow definition of accident which included only injuries caused by external violence and the broader Webster definition which included any wrong, damage or mischief done or suffered.[26] The definitions "an unlooked-for mishap or untoward event which is not expected or designed" and "traceable within reasonable limits, to a definite time, place and occasion or cause" still haunt many courts.[27]

California was among the first to jump the hurdle toward the inclusion of diseases by discarding the term "accident." The initial compulsory workmen's compensation legislation in California covered only injuries sustained by accident. Since the term "accident" had been in-

21. *Id.* at 15.
22. 10 U.C.L.A. L. REV. 161, 163 (1962).
23. Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad,* 42 CALIF. L. REV. 531, 542 (1954).
24. *Id.* at 541.
25. *Id.* at 543.
26. San Francisco v. I.A.C., 183 Cal. 273 (1920).
27. Risenfeld, *supra* note 23, at 543 *citing* Swan v. Williamson, 74 Ida. 32, 257 P.2d 552, 555 (1953); Snoden v. Watchung Borough, 29 N.J. Super. 41, 101 A.2d 583, 586 (1953).

terpreted to exclude diseases, the law was amended in 1915 and the phraseology relating to accidents was abandoned in favor of the more liberal, "any injury arising out of and in the course of employment."[28] In the early cases, the California courts adopted the Webster definition of accident previously mentioned,[29] and with the 1917 act, California became the first state to expressly include disease by defining injury to include "any disease arising out of employment."[30] In *San Francisco v. I.A.C.*,[31] the applicant died after the code had been changed to eliminate "accident" but before it expressly included diseases, however the decision was reached after the 1917 amendment. The court declared: "[T]he provision of the compensation act, whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid . . . is operative and controlling."[32] By 1920, then, the California courts were uniformly allowing recovery for diseases which arose out of the employment.

When Does a Disease "Arise Out of" Employment?

While the inclusion of diseases under the workmen's compensation act cured some of the ills, it did not prove to be the universal panacea. As the courts so often reiterate, "[t]he burden is on a petitioner to establish that he suffered an accident arising out of and in the course of employment."[33] Although there is an underlying policy to resolve conflicts or questionable areas in favor of the applicant-employee,[34] the burden of proving that a disease arose out of employment is sometimes difficult for the employee to carry.[35]

Among the many factors contributing to this difficulty has been the reluctance of the courts to overturn the rulings of the Industrial Accident Commission (or Workmen's Compensation Appeals Board as it is now called). They have stated many times "[a]lthough we might dis-

28. *Swezey, supra* note 17.
29. San Francisco v. I.A.C., 183 Cal. 273 (1920); Fidelity & Casualty Co. of N.Y. v. I.A.C., 177 Cal. 614 (1918); Hartford Accident & Indem. Co. v. I.A.C., 32 Cal. App. 481 (1917).
30. *Swezey, supra* note 17. *See also* Cal. Labor Code § 3208.
31. 183 Cal. 273 (1920).
32. *Id.* at 282.
33. Black v. Mahoney Troast Construction, 65 N.J. Super. 397, 168 A.2d 62, 65 (1961). *See also* Singlaub v. I.A.C., 87 Cal. App. 324 (1927); Bethlehem Steel Co. v. I.A.C., 21 Cal. 2d 742 (1943); Children's Hospital Soc. v. I.A.C., 22 Cal. App. 2d 365 (1937).
34. Cal. Labor Code § 3202.
35. *See, e.g.*, Black, 65 N.J. Super. 397, 168 A.2d 62 (1961); Stuckey v. City of Alexandria, 81 So. 2d 46 (La. 1955); Edlund v. I.A.C., 122 Utah 238, 248 P.2d 365 (1952); Tillman v. Stanley Iron Works, 222 Minn. 421, 24 N.W.2d 903 (1946); Children's Hospital Soc., 22 Cal. App. 2d 365 (1937); McNamara v. I.A.C., 130 Cal. App. 284 (1933).

agree with the Commission as to the weight of the evidence before it, as an appellate tribunal we may not overturn a finding of fact it has made if there is some evidence to support it."[36] The California Labor Code makes a provision for appellate review in workmen's compensation cases and states that the court may, among other things, "determine . . . whether . . . the order, decision, or award was not supported by *substantial* evidence" (emphasis added).[37] In view of this section, it would appear that the court's determination to uphold the findings on virtually any evidence at all is not justified. By review of some of the more recent cases, it is apparent that the Workmen's Compensation Appeals Board has a tendency to deny awards, even contrary to the findings of the referee. While the courts on review presently tend to overturn some of these findings more frequently, they still often tend to uphold the findings of the Board on very slight evidence.[38] The more modern tendency of the court to overturn Board findings not supported by the evidence is an aid to the applicant; the necessity of taking a case to the court on appeal, however, is both time consuming and expensive and may prove prohibitive for many applicants.

Another such factor involves the considerable reliance on expert medical testimony, since proving that a disease arose out of the employment is often necessarily dependent upon it. In many diseases there are several medical points of view as to causation, frequently resulting in a conflict of medical testimony.[39] This conflict coupled with the fact that the opinion of any one of several doctors is often sufficient evidence to support the Board's decision,[40] leads to a "battle of the witnesses" and pro-

36. Newton v. I.A.C., 204 Cal. 185, 186 (1928). *See also* McCallister v. W.C.A.B., 69 Cal. 2d 408 (1968); Buescher v. W.C.A.B., 265 Cal. App. 2d 520 (1968); Owings v. I.A.C., 31 Cal. 2d 689 (1948); Lumbermen's Mutual Cas. Co. v. I.A.C., 29 Cal. 2d 492 (1946); Pacific Employers Ins. Co. v. I.A.C., 19 Cal. 2d 622 (1942); Engels Copper Mining Co. v. I.A.C., 183 Cal. 714 (1920); Dixon v. W.C.A.B., 33 Cal. Comp. Cases 675 (1968); Murphy v. W.C.A.B., 33 Cal. Comp. Cases 463 (1968); Loveday v. W.C.A.B., 33 Cal. Comp. Cases 273 (1968); and Sand v. W.C.A.B., 33 Cal. Comp. Cases 86 (1968).

37. CAL. LABOR CODE § 5952.

38. *See, e.g.*, Mark v. I.A.C,. 29 Cal. App. 2d 494 (1938); Smith v. W.C.A.B., 34 Cal. Comp. Cases 424 (1969); Fontno v. W.C.A.B., 34 Cal. Comp. Cases 363 (1969); Clemmens v. W.C.A.B., 34 Cal. Comp. Cases 23 (1969); Higel v. W.C.A.B., 33 Cal. Comp. Cases 753 (1968); Buescher, 33 Cal. Comp. Cases 537 (1968); Tucker v. W.C.A.B., 33 Cal. Comp. Cases 517 (1968); Bingham v. W.C.A.B., 33 Cal. Comp. Cases 295, 261 Cal. App. 2d 842 (1968); and Sand, 33 Cal. Comp. Cases 86 (1968).

39. *See, e.g.*, Chambers v. W.C.A.B., 69 Cal. 2d 556 (1968); Fireman's Fund Indemnity Co. v. I.A.C., 39 Cal. 2d 831 (1952); Blankenfeld v. I.A.C., 36 Cal. App. 2d 690 (1940); Mark, 29 Cal. App. 2d 495 (1938); McNamara, 130 Cal. App. 284 (1933); Nielson v. I.A.C., 125 Cal. App. 210 (1932); Winthrop v. I.A.C., 213 Cal. 351 (1931); Eastman v. I.A.C., 186 Cal. 587 (1921); Smith, 34 Cal. Comp. Cases 424 (1969); Fontno, 34 Cal. Comp. Cases 363 (1969); Higel, 33 Cal. Comp. Cases 753 (1968); Tucker, 33 Cal. Comp. Cases 517 (1968); Sand, 33 Cal. Comp. Cases 86 (1968); Sand, 33 Cal. Comp. Cases 86 (1968); Murphy, 33 Cal. Comp. Cases 463 (1968); Loveday, 33 Cal. Comp. Cases 273 (1968); Santa Maria Country Club v. W.C.A.B., 32 Cal. Comp. Cases 7 (1967).

40. *See, e.g.*, McCallister, 69 Cal. 2d 408 (1968); Dixon, 33 Cal. Comp. Cases

duces a great deal of uncertainty as to the outcome in any one particular case.

Sufficiency of Circumstantial Evidence

An applicant frequently must rely on circumstantial evidence in order to prove work-related causation. Workmen's compensation case book writers have indicated that the clarity with which the evidence shows a causal connection between the disease and work is often a determinative factor.[41]

> The fact that the job was one that was likely to produce the type of injury complained of lends credibility to the claim. . . . Conversely, where the working conditions are not such as to make the occurrence of the injury or the contraction of the disease likely, claimant may fail to make out his case by purely circumstantial evidence.[42]

For example, the case of *Children's Hospital Society v. I.A.C.*[43] involved a nurse who spent around 90% of her time in a children's hospital. She eventually contracted polio. Since the hospital did not ordinarily care for infectious disease cases, and had only five post polio patients, an award was denied. The expert testimony indicated that there was insufficient knowledge about the disease to determine whether the post polio patients could still be carriers. Under similar circumstances, awards were denied to a zoo night watchman with psittacosis,[44] a legal typist with osteoarthritis in her fingers,[45] an employee of a highway contractor with a bad knee,[46] for typhoid fever contracted on business in a city where an epidemic raged,[47] and a watchman who collapsed and died on the job.[48]

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675 (1968); Loveday, 33 Cal. Comp. Cases 273 (1968); Murphy, 33 Cal. Comp. Cases 463 (1968); Sand, 33 Cal. Comp. Cases 86 (1968); Tucker, 33 Cal. Comp. Cases 517 (1968); McCutcheon v. W.C.A.B., 33 Cal. Comp. Cases 261 (1968); and Burdsall v. W.C.A.B., 32 Cal. Comp. Cases 495 (1967).

41. W. MALONE AND M. PLANT, CASES AND MATERIALS ON WORKMEN'S COMPENSATION 292 (1963).

42. *Id.* at 323.

43. 22 Cal. App. 2d 365 (1937).

44. Stuckey v. City of Alexandria, 81 So. 2d 46 (La. 1955). The disease is infectious and contracted through the mouth or nose and is carried by birds. Since the watchman was not required to feed the birds or animals regularly and was only occasionally required to be near them, recovery was denied.

45. Edlund v. Industrial Commission, 122 Utah 238, 248 P.2d 365 (1952) where the osteoarthritis was in the end joints of the fingers of a woman who had been a legal typist for 17 years. The basis of the denial in that case was that the disease was not a usual occurrence in the occupation of a typist.

46. Newton v. I.A.C., 204 Cal. 185 (1928) dealing with a 20 year-old boy whose knee gave way while he tried to flag down a truck during his employment for a highway contractor. He was running when it occurred and the experts finding no signs of external trauma determined that it occurred as a result of the normal motion of the leg in running. Running was not apparently a normal occurrence of his employment and the award was denied.

47. Pattiani v. I.A.C., 199 Cal. 596 (1926) where the court held that his exposure was no greater than the commonality and denied recovery.

48. Black v. Mahoney & Troast Construction, 65 N.J. Super. 397, 168 A.2d 62

The foregoing cases all suffered from lack of normal occurrence in the job, with some also plagued by weak medical testimony—leading to denials of recovery.

Occupational Diseases in California

While many states specifically designate which diseases are occupational by statute (schedule system), California subscribes to the so-called "blanket system."[49] Diseases are compensable whether or not they are "occupational."

> The California courts have, however, recognized from the outset that diseases arising out of employment fall into two classes: (1) industrial or occupational disease which is the natural and expected result of a workman following a particular occupation for a considerable period of time, and (2) other disease which is the result of some unusual condition of the employment.[50]

The courts have determined that silicosis,[51] glass blower's arm,[52] lead poisoning,[53] and wheat allergy,[54] are occupational diseases. Berylliosis,[55] emphysema,[56] dermatitis,[57] and hearing loss[58] are among the diseases which have been termed occupational by the Industrial Accident Commission.

Although a determination that a disease is occupational is some aid to the applicant, the fact that his disease has been so determined does not assure him of recovery.[59] An occupational disease has been defined by by courts as

> one in which the cumulative effect of exposure in the employment environment ultimately results in manifest pathology and which is a 'natural incident of a particular occupation as distinguished from and exceeding the hazard and risk of ordinary employment.'[60]

(1961) where the 57 year-old watchman collapsed and died on a hot and humid day while on the job. There was some evidence that he suffered from a syndrome of progressive pre-existing idiopathic diseases which culminated in the cerebrovascular incident which ultimately caused his death. The experts did not agree, however, as to whether his employment contributed to his demise and the award was denied.

49. *Risenfeld, supra* note 23, at 542-543.
50. *Swezey, supra* note 17, at 207.
51. Colonial Ins. Co. v. I.A.C., 29 Cal. 2d 79 (1946); Marsh v. I.A.C., 217 Cal. 338 (1933).
52. Blanchard v. I.A.C., 68 Cal. App. 65 (1924).
53. Moore Shipbuilding Co. v. I.A.C., 70 Cal. App. 495 (1925).
54. Baker v. I.A.C., 31 Cal. Comp. Cases 228 (1966).
55. Gardner v. State Comp. Ins. Fund, 16 Cal. Comp. Cases 113 (1951); Pacific Emp. Ins. Co. v. I.A.C., 15 Cal. Comp. Cases 281 (1950).
56. Calif. Cas. Ind. Exch. v. I.A.C., 31 Cal. Comp. Cases 135 (1966).
57. Pacific Emp. Ins. Co. v. I.A.C., 5 Cal Comp. Cases 188 (1940).
58. Messner v. I.A.C., 27 Cal. Comp. Cases 226 (1962); Argonaut Ins Co. v. I.A.C., 29 Cal. Comp. Cases 390 (1964).
59. Santa Maria Country Club, 32 Cal. Comp. Cases 7 (1967); Tucker, 33 Cal. Comp. Cases 517 (1968).
60. *Swezey, supra* note 17, at 206-207.

Therefore the applicant must still carry the burden of proving that the disease is a result of a cumulative effect of the employment environment and not due to some outside cause. Since it must also be a natural incident of this type of employment, it becomes more difficult to show that the disease is occupational if the employment-disease relationship is not one which the court or Board has previously encountered.[61] The individual may sometimes even have difficulty proving that his disease is not wholly preexisting and is at least aggravated by his employment.[62] Where, however, a disease has been determined to be occupational and the industry is one known to cause the disease, the Board has much less difficulty in granting an award.[63] It would appear then, that clear factual circumstances and good medical evidence may still be very important, even where the disease has been determined to be "occupational."

Disease Resulting from Unusual Conditions of Employment

Diseases which result from some unusual condition of employment have an even heavier burden of proof to carry than do occupational diseases. These cases face the same problems with medical testimony and circumstantial evidence mentioned above. Those which are infectious in nature have the added burden of showing that the disease was contracted as a result of exposure on the job which was greater than the commonality.[64] In *Engels Copper Mining Co. v. I.A.C.*,[65] the court said,

> the burden rested on (the plaintiff) to show that his illness resulted from exceptional exposure to which he was subjected. . . . [I]n order to meet this burden he had to show facts sufficiently cogent to take the determination of the question out of the realm of pure conjecture.[66]

Bethlehem Steel Co. v. I.A.C.[67] produced a similar statement by the court,

> It is well established in this state that compensation is not due merely for injury caused by disease contracted while employed

61. *See* note 57 *supra.*
62. Chambers, 69 Cal. 2d 556 (1968).
63. *See, e.g.,* Colonial Ins. Co., 29 Cal. 2d 79 (1946); Marsh, 217 Cal. 338 (1933); Moore Shipbuilding, 70 Cal. App. 495 (1925); Blanchard, 68 Cal. App. 65 (1924); Masonite Corp. v. I.A.C., 30 Cal. Comp. Cases 89 (1965); U.S. Lime Products v. I.A.C., 29 Cal. Comp. Cases 253 (1964); Baker, 31 Cal. Comp. Cases 228 (1966).
64. *See, e.g.,* Bethlehem Steel Co., 21 Cal. 2d 742 (1943); Pacific Emp. Ins. Co., 19 Cal. 2d 622 (1942); Children's Hosp. Soc., 22 Cal. App. 2d 365 (1937); London Guaranty & Accident Co. v. I.A.C., 202 Cal. 239 (1927); Pattiani, 199 Cal. 596 (1926); Engels Copper Mining Co., 183 Cal. 714 (1920).
65. 183 Cal. 714 (1920).
66. *Id.* at 717.
67. 21 Cal. 2d 742 (1943).

> . . . . The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i.e., the injury must be a natural or reasonably probable result of the employment or conditions thereof.[68]

Recoveries have been allowed in this area for a contagious eye disease among shipyard workers where it was being contracted by them in greater epidemic proportions than the rest of the public,[69] where a travelling salesman contracted San Joaquin Valley fever during a trip to an area where the disease was endemic,[70] and in cases involving actinomycosis,[71] tuberculosis,[72] hepatitis,[73] and influenza.[74]

Awards have been denied in very similar circumstances where the evidence was either less convincing or the medical testimony was somewhat weak. Cases where recoveries were denied include viral encephalitis in a policeman who had contact with 500 prisoners per month but where there were no known cases of encephalitis and the medical testimony consisted only of suppositions in his favor,[75] and under similar circumstances to an arc welder who died from nephritis,[76] a man suffering from diabetes,[77] a salesman with typhoid fever,[78] and a nurse with polio.[79] In many of these cases, the etiology of the disease was unknown and the general presumption to resolve conflicts in favor of the applicant[80] should have prevailed, but it apparently did not.

Pre-existing Disease in California

Another very important area is that of aggravation of a pre-existing

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68. *Id.* at 744.
69. Bethlehem Steel Co., 21 Cal. 2d 742 (1943).
70. Pacific Emp. Ins. Co., 19 Cal. 2d 622 (1942).
71. *See* Hartford Acc. & Indem. Co. v. I.A.C., 32 Cal. App. 481 (1917) where an award was allowed to an employee of a granary when it was shown by medical testimony that the disease might be conveyed to humans by grain.
72. *See* Layden v. Ind. Indem. Co., 25 Cal. Comp. Cases 40 (1959) wherein a clerical employee contracted tuberculosis from close contact with a fellow employee who had the disease.
73. Argonaut Ins. Co. v. I.A.C., 25 Cal. Comp. Cases 65 (1960) involved a nurse who contracted hepatitis after dealing with it in a hospital.
74. *See* Engels Copper Mining Co., 183 Cal. 714 (1920) where a safety engineer in a mine contracted influenza during an epidemic after having helped give medical attention to other employees for five or six days; San Francisco, 183 Cal. 273 (1920) where a hospital steward died from influenza after having handled 12 cases of the disease during his work.
75. McGavock v. W.C.A.B., 32 Cal. Comp. Cases 419 (1967).
76. Tillman, 222 Minn. 421, 24 N.W.2d 903 (1946). It was shown that the amount of nitrous oxide he inhaled on his job was within the established safety zone.
77. Owings, 31 Cal. 2d 689 (1948). Applicant contracted diabetes after sustaining a blow to the head during work and where medical testimony in his behalf was at best weak.
78. Pattiani, 199 Cal. 596 (1926). Applicant contracted typhoid fever while sent to New York City on business while that city was undergoing an epidemic.
79. Children's Hospital Soc., 22 Cal. App. 2d 365 (1937). Applicant contracted polio where the hospital of her employ did not generally handle infectious disease cases.
80. CAL. LABOR CODE § 3202.

disease. While it has long been established in California that recovery may be had for work-related aggravation of a pre-existing disease,[81] it often remains a problem for the applicant to prove that his particular job was responsible for aggravation of his disease.[82] A survey of the cases in this area indicates that a great proportion of them deal with various forms of heart disease. The Medical Advisory Committee of the Division of Industrial Accidents indicates that in 1968, fifty-four percent of all deaths were due to diseases of the heart and blood vessels and that more than 1,000,000 Americans and 100,000 Californians die each year from these diseases.[83] Proving job-related aggravation is generally very difficult because there are at least two schools of thought in the medical profession as to what type of stress will aggravate a pre-existing heart condition.[84] As a result, the overwhelming majority of the cases in this area involve conflicts in medical testimony,[85] and it is not unusual to see one doctor appearing frequently on the side of employers while another doctor is often visible as a plaintiff's expert.[86] Regardless of the factual setting, the employer's doctor invariably determines that the death or injury is entirely due to the pre-existing disease and is not work-related while the plaintiff's expert continuously finds the problem to have been precipitated by stress of the job.[87] Since the ultimate decision as to whether or not the employment contributed to the harm

81. *See, e.g.*, Lumbermen's Mutual Cas. Co., 29 Cal. 2d 492 (1946); Buckley v. Roche, 214 Cal. 241 (1931); Knock v. I.A.C., 200 Cal. 456 (1927); Eastman, 186 Cal. 587 (1921); Norris Industries, Inc. v. W.C.A.B., 33 Cal. Comp. Cases 639 (1968).

82. *See, e.g.*, McNamara, 130 Cal. App. 284 (1933); Winthrop, 213 Cal. 351 (1931); Singlaub, 87 Cal. App. 324 (1927); Shelby v. W.C.A.B., 34 Cal. Comp. Cases 523 (1969); Tschudin v. W.C.A.B., 33 Cal. Comp. Cases 102 (1968); Huff v. Petrolite Corp., 32 Cal. Comp. Cases 117 (1967); Marler v. W.C.A.B., 32 Cal. Comp. Cases 386 (1967).

83. Calif. Medical Advisory Committee, Division of Industrial Accidents, Guidelines for Determination of Disputed Questions of Medical Fact in Workmen's Compensation Cases, 3 (1968).

84. CIRCULATION, January, 1958, Vol. XVII, at 1. One school of thought contends that only physical stress can aggravate a heart condition, while another subscribes to the theory that emotional or mental stress may be equally detrimental to an individual with a heart condition. *See, e.g.*, Mark, 29 Cal. App. 2d 495 (1938); Fontno, 34 Cal. Comp. Cases 363 (1969); Higel, 33 Cal. Comp. Cases 753 (1968); Black v. W.C.A.B., 33 Cal. Comp. Cases 165 (1968); Sand, 33 Cal. Comp. Cases 86 (1968); Emp. Mut. Liab. Ins. Co. v. W.C.A.B., 32 Cal. Comp. Cases 44 (1967).

85. *See, e.g.*, Lumbermen's Mutual Cas. Co., 29 Cal. 2d 492 (1946); Fireman's Fund Indem. Co., 39 Cal. 2d 831 (1952); Blankenfeld, 36 Cal. App. 2d 690 (1940); Mark, 29 Cal. App. 2d 495 (1938); McNamara, 130 Cal. App. 284 (1933); Nielson, 125 Cal. App. 210 (1932); Eastman, 186 Cal. 587 (1921); Shelby, 34 Cal. Comp. Cases 523 (1969); Fontno, 34 Cal. Comp. Cases 95 (1969); Higel, 33 Cal. Comp. Cases 753 (1968); Loveday, 33 Cal. Comp. Cases 273 (1968); Tschudin, 33 Cal. Comp. Cases 102 (1968); Sand, 33 Cal. Comp. Cases 86 (1968); Marler, 32 Cal. Comp. Cases 386 (1967); Ballance Brothers v. W.C.A.B., 32 Cal. Comp. Cases 383 (1967); U.S. Steel Corp. v. W.C.A.B., 32 Cal. Comp. Cases 209 (1967); U.S. Gypsum Co. v. W.C.A.B., 32 Cal. Comp. Cases 184 (1967); Emp. Mut. Liab. Ins. Co., 32 Cal. Comp. Cases 44 (1967).

86. *See, e.g.*, Tschudin, 33 Cal. Comp. Cases 102 (1968); F.M.C. Corp., 34 Cal. Comp. Cases 95 (1969); Marler, 32 Cal. Comp. Cases 386 (1967); U.S. Gypsum, 32 Cal. Comp. Cases 184 (1967).

87. *Id.*

is a question of fact for the determination of the Appeals Board,[88] and the testimony of any single doctor is generally sufficient to sustain the findings of the Board,[89] the result in a particular case cannot be anticipated.

The situations under which awards have been denied in this area are frequently very surprising.[90] Some examples of such denials include a salesman who had been working long hours and suffered a heart attack shortly after receiving a disturbing business call,[91] and a man with two jobs, one as a box boy and another as a warehouseman, who was working 60 to 80 hours a week.[92]

The Appeals Board seems to have a greater propensity for denials than does the appellate court.[93] The following are a few cases in which denials by the Board were overturned by the appellate court: A movie studio employee who did much moving and lifting of heavy objects, suffered a heart attack after helping to move an object weighing between 500 and 700 pounds. He died six days later.[94] A supervisor in a printing plant who had worked six days a week, 70 hours per week for 40 years and who had great responsibilities,[95] and an individual whose work consisted of cutting trees and lifting logs weighing up to 90 pounds, died of heart failure.[96] Many of the cases were reversed on insufficiency of the medical testimony accepted by the Board.[97]

It is interesting to note that the factual situations under which the Appeals Board saw fit to allow awards often seem no more compelling than those which were denied.[98] A few outstanding examples include a

88. Argonaut Ins. Co. v. I.A.C., 231 Cal. App. 2d 111 (1964).

89. Sand, 33 Cal. Comp. Cases 86 (1968).

90. *See,* McNamara, 130 Cal. App. 284 (1933) wherein a laundry truck driver who had to crank a truck each time he stopped, made 250 calls a week, and often was required to climb stairs carrying bundles of varying sizes; Shelby, 34 Cal. Comp. Cases 523 (1969) involved a salesman who died while on vacation and who had been asked to retire due to his known heart problem but had refused; Tschudin, 33 Cal. Comp. Cases 102 (1968) where an upholstery cutter who lifted a 40 to 60 pound bolt of material eighteen minutes before his death from heart disease; Marler, 32 Cal. Comp. Cases 386 (1967) involved a machinist's helper whose work involved lifting from 50 to 100 pounds and continuous exposure to gases.

91. Sand, 33 Cal. Comp. Cases 86 (1968).

92. Huff, 32 Cal. Comp. Cases 117 (1967).

93. *See, e.g.,* Mark, 29 Cal. App. 2d 495 (1938) where a 50 year-old ranch superintendent suffered a coronary occlusion after a hard day's work and died one month later; Nielson, 125 Cal. App. 210 (1932) involved a cabinet maker for 15 years who died of a heart attack shortly after helping seven others carry a heavy altar top; Knock, 200 Cal. 456 (1927) wherein a ranch manager who just prior to his attack went to a level of 3500 feet and walked a great distance; Fontno, 34 Cal. Comp. Cases 363 (1969) which involved an individual whose work consisted of cutting trees and lifting logs weighing up to 90 pounds.

94. Blankenfeld, 36 Cal. App. 2d 690 (1940).

95. Higel, 33 Cal. Comp. Cases 753 (1968).

96. Smith, 34 Cal. Comp. Cases 424 (1969).

97. *See, e.g.,* Blankenfeld, 36 Cal. App. 2d 690 (1940); Mark, 29 Cal. App. 2d 495 (1938); Smith, 34 Cal. Comp. Cases 424 (1969); Fontno, 34 Cal. Comp. Cases 363 (1969); Higel, 33 Cal. Comp. Cases 753 (1968).

98. *See, e.g.,* Fireman's Fund Indem. Co., 39 Cal. 2d 831 (1952) involving a

policeman who had to climb two flights of stairs to a photograph gallery where he worked,[99] a maintenance electrician who entered a pit to splice cables and died 15 minutes later while apparently attempting to lift himself from the pit,[100] and an electrical maintenance man who was removing 10 foot lengths of conduit weighing around 25 pounds and carrying them a short distance just prior to his attack.[101] In the foregoing cases, the award was generally allowed on the strength of the medical testimony.

It appears from the foregoing that whether the disease is infectious, "occupational" or pre-existing, proving causation depends on strong medical testimony and clear factual circumstances. In any case, anticipation of outcome is very difficult, if not impossible.

Switch of Responsibility?

Use of Insurance

Employers in California are generally required to carry workmen's compensation insurance or to obtain permission to be self insured.[102] Premiums are charged as a percentage of the payroll with rates varying depending upon the occupational classification.[103] In 1965, the average premium cost of the employer was approximately $1.75 per $100 of payroll,[104] however, since some insurance carriers give dividends to their policy holders, the average premium rate is often somewhat lower. As mentioned earlier, one of the original underlying theories of workmen's compensation was that the burden of wearing out human machinery should become a cost of production which is borne by the industry.[105] If, due to the problems of proof, diseases which should be under this scheme are not, the industry is not carrying that burden.

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man with existing hypertension who spent 65 days working 11 hours per day in an atmosphere of strain and tension in an attempt to negotiate a union contract; Lumbermen's Mutual Cas. Co., 29 Cal. 2d 492 (1946) which involved an individual who had been working 10-20 hours per day, seven days a week for four months; F.M.C. Corp., 34 Cal. Comp. Cases 95 (1969) involving a coreman where the testimony between the applicant and his foreman was in dispute as to whether he had engaged in physical exertion just prior to the attack; Ballance Brothers, 32 Cal. Comp. Cases 383 (1967) dealing with a construction worker who complained of shortness of breath during the two months he was so employed and had to walk 200 yards uphill to his job on the morning he suffered the attack; Emp. Mut. Liab. Ins. Co., 32 Cal. Comp. Cases 44 (1967) involving a construction employee working on a freeway where the temperature under which he was working was disputed—no evidence of physical exertion on the day of the attack.

99. Buckley, 214 Cal. 241 (1931).
100. U.S. Steel Corp., 32 Cal. Comp. Cases 209 (1967).
101. U.S. Gypsum Co., 32 Cal. Comp. Cases 184 (1967).
102. 1965 Calif. Report of the Workmen's Compensation Study Commission, at 46.
103. *Id.* at 47.
104. *Id.* at 52.
105. Hanna, at 15.

Social Security Disability Insurance covered 29,365 California workers in 1966 (latest figures available).[106] In that year, diseases accounted for 89% of all the Social Security Disability awards,[107] and it is probably safe to assume that many of these would have been potential cases for workmen's compensation. The 1968 figures for workmen's compensation awards show that 204,559 work injuries were compensated through workmen's compensation.[108] Of these, 7,880 were diseases—slightly more than 3 1/2% of the total awards.[109] Of the 7,880 diseases compensated, almost one-half (3,394) occurred in agencies dealing with chemicals, hot and or injurious substances.[110] Of workmen's compensation awards allowed for diseases, the greatest incidence were skin diseases (2,318 or 29.4%), next came diseases of bone or organs of movement (1,370 or 17.4%), then poisoning (1,136 or 14.4%) and fourth was heart disease (960 or 12.3%).[111] In contrast, the Social Security figures for disability awards to California workers shows the greatest incidence of allowances for circulatory diseases including heart disease (6,967 or 23.7%), next diseases of the bones and organs of movement (4,973 or 16.9%), then diseases of the nervous system and sense organs (3,350 or 11.4%) and fourth mental diseases (3,202 or 10.9%).[112] The most frequent primary diagnoses for Social Security Disability allowances in California in 1966 were; (1) arteriosclerotic heart disease, (2) emphysema, (3) disc displacement, (4) osteoarthritis, and (5) schizophrenia.[113] Again in contrast, under workmen's compensation the five most frequent diagnoses were; (1) skin conditions, (2) eye conditions, (3) chemical burns, (4) respiratory conditions of toxic origin and (5) digestive disorders.[114]

It is interesting to note the disparity between the most freqent incidences of certain types of diseases under the two types of compensation. It appears that those diseases where the work relationship is more readily apparent, *e.g.*, skin diseases, eye conditions, chemical burns, and poisoning, are compensated under workmen's compensation laws, while those with a more difficult burden of proof (*e.g.*, heart disease, diseases of the nervous system, mental diseases, etc.) are handled by the Social

106. SOCIAL SECURITY ADMIN., SOCIAL SECURITY DISABILITY APPLICANT STATISTICS, at 45 (1966).
107. *Id.* at 8-9.
108. CALIF. DEPT. OF INDUSTRIAL RELATIONS, CALIFORNIA WORK INJURIES 1968, at 5.
109. *Id.* at 19.
110. *Id.* at 41.
111. *Id.* at 19.
112. SOCIAL SECURITY DISABILITY APPLICANT STATISTICS, *supra* note 106, at 46.
113. *Id.* at 47.
114. CALIF. BUREAU OF OCCUPATIONAL HEALTH AND ENVIRONMENTAL EPIDEMIOLOGY, OCCUPATIONAL DISEASE IN CALIFORNIA 1967, at 20-21.

Security system. The small percentage of workmen's compensation awards for certain diseases with a large percentage of incidence in the general population,[115] and the knowledge of some of the proof problems leads one to believe that there has indeed been a shift of responsibility in caring for those who become disabled from some work-related diseases. It appears likely that many applicants faced with the onerous burden of proof opt for the easier, though less adequate compensation offered through the Social Security Disability Insurance. If this is true, as it appears, these awards are being paid for through each employee's own deductions for social security insurance. The idea that the use of human machinery should be a cost of production no longer seems viable. Indeed, the court states as a reason for denial of recovery, "[e]very day's work consumes so much reserve force of the heart of every laborer."[116] This judicial reasoning seems contraindicated by the "human machinery" concept which was one of the original bases of workmen's compensation.

Presumptions—Would They Aid?

There are two basic types of presumptions which can be applied and each has a different effect on a particular case. The California Evidence Code states that "a presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence."[117] The code provides for either a conclusive presumption or a rebuttable presumption and explains further that every rebuttable presumption "is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."[118] A rebuttable presumption which affects the burden of producing evidence exists only to facilitate the determination of a particular case.[119] The effect of this presumption is limited, however, since as soon as evidence is introduced which is sufficient to create an equipoise, the presumption disappears.[120] The presumption affecting the burden of proof, on the other hand, exists to implement some strong public policy,[121] and it has the effect of switching the burden of proof so the opposing party must rebut the presumed fact by showing its nonexistence.[122]

115. *See* note 83 *supra*, relating to statistics of heart disease.
116. McNamara, 130 Cal. App. 284, 289-290.
117. CAL. EVID. CODE § 600(a).
118. CAL. EVID. CODE § 601.
119. CAL. EVID. CODE § 603.
120. CAL. EVID. CODE § 606.
121. CAL. EVID. CODE § 605.
122. CAL. EVID. CODE § 606.

The presumption which already exists in the codes in favor of certain law enforcement and fire fighting employees has been determined to be merely a presumption affecting the burden of producing evidence.[123] This results in the fact that the testimony of one doctor is sufficient to rebut the presumption[124] and the applicant is then put in the position of having to produce his own evidence with the usual battle of the experts resulting. However, if the employer puts on no evidence at all, the decision must favor the applicant,[125] and it has at least been determined that mere evidence of a pre-existing disease is insufficient to rebut the presumption.[126]

Possibly because it seems to require so little evidence to rebut the presumption,[127] the fire fighters and law enforcement officers have been pushing for the passage of S.B. 763 which would make the presumption conclusive.[128] A conclusive presumption, however, would leave no room for a showing that the disease may not be in any way related to the job, and in view of the apparent lack of medical certainty in this area, a conclusive presumption may not be very realistic.

SUMMARY

Workmen's compensation evolved to fulfill a need largely created by the industrial revolution—the adequate compensation of injured workers. It was based on social and economic considerations one of which was to make the use of human machinery a cost of production. The inclusion of diseases—a problem from the start—created special problems of proof.

Pre-existing disease, occupational disease and diseases resulting from some unusual condition of employment are the three major types of disease problems recognized in California. All have difficulty with proof. The strong dependence on medical experts and reluctance of appellate courts to overturn Board decisions if supported by some evidence are contributing factors.

Heart disease and related circulatory problems figure prominently in the area of pre-existing disease. Since there is a great deal of medical uncertainty in the area, results of cases are often incongruous and most

123. McCutcheon, 33 Cal. Comp. Cases 261 (1968).
124. McCutcheon, 33 Cal. Comp. Cases 261 (1968); Black, 33 Cal. Comp. Cases 165 (1968); Burdsall, 32 Cal. Comp. Cases 495 (1967).
125. Peters v. Sacramento City Emp. Ret. System, 27 Cal. App. 2d 10 (1938).
126. Bussa v. W.C.A.B., 259 Cal. App. 2d 261 (1968); Turner v. W.C.A.B., 258 Cal. App. 2d 442 (1968); State Emp. Ret. System v. W.C.A.B., 267 Cal. App. 2d 611 (1968); Peters, 27 Cal. App. 2d 10 (1938).
127. *See* note 124.
128. Letters from Paul R. Lyons, Editor, Firemen Magazine to Senator Milton Marks dated April 7, 1969 and March 14, 1969.

unpredictable. Heart disease is prevalent in many walks of life and there is no showing that it is peculiar to the classes of public employees affected by the present presumptions and S.B. 763. Those diseases, including heart disease, in which the work relationship is difficult to prove are being compensated less by workmen's compensation. The injured worker is looking for aid elsewhere—often turning to Social Security Disability Insurance and similar programs.

The present presumption, which has been termed one affecting the burden of producing evidence, has offered little aid and is apparently not the answer. While there is an obvious need for some help in the area, it should be of a different nature and wider in scope than S.B. 763.

CONCLUSION

From the foregoing, it can be seen that the average applicant for workmen's compensation benefits often has great difficulty showing that his disease "arose out of employment." The responsibility for caring for individuals suffering from diseases which are work-related in some way appears to be shifting to areas other than workmen's compensation. It seems evident that in the area of diseases, the original purpose of workmen's compensation to make the use of human machinery a cost of production is not being met. The awards of workmen's compensation which are based on portions of the individual's salary,[129] with medical care unlimited as to time or money,[130] are frequently more adequate than other methods of compensation. In the proper case, the worker should have the advantage of the more adequate workmen's compensation award, and since workmen's compensation has failed to compensate for many diseases "arising out of the employment," the applicant apparently needs a helping hand in the area of proof.

The Workmen's Compensation Study Commission, which was established in 1963 through the enactment of Labor Code sections 6200 to 6240,[131] indicated that it felt the problem of uncertainty as it relates to heart disease, should be resolved by a set of guidelines from the medical profession.[132] They further state: "Although some workers outside of public employment are exposed to risks similar to those faced by the named group of government employees, we see no necessity for extend-

129. 1965 CALIF. REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION, at 14.
130. *Id.* at 95; CAL. LABOR CODE § 4600.
131. 1965 CALIF. REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION, at 1.
132. *Id.* at 118.

ing the presumptions to nongovernmental employees."[133] The Commission, however, seemed to be generally against the presumptions as they now exist and desired to rely on the medical profession to develop adequate guidelines.

While fire fighters and law enforcement people contend that their work is particularly stressful,[134] the cases indicate that the problem of heart disease is indeed very prevalent outside these classes of public employment.[135] It would therefore appear that the present presumptions and the recent attempts to make them conclusive are more the result of effective lobbying than of any special need.

As has been shown earlier in this article, while heart disease is a major problem, other diseases are often equally difficult to prove. The use of medical guidelines, as proposed by the Workmen's Compensation Study Commission, could possibly contribute to a solution of the problem—if applied religiously and constantly updated. However, even the Study Commission indicated that at least one other state which has the guidelines has not put them to use.[136] It is therefore this writer's opinion that a rebuttable presumption should be enacted which extends to all employees covered by workmen's compensation and which covers any and all diseases which might be work-related. Furthermore, the presumption should be enacted in order to facilitate the public policy which underlies workmen's compensation legislation—the resolution of disputed matters in favor of the applicant and the payment by industry for the use of human resources—and should therefore be a presumption affecting the burden of proof. This type of presumption would not be unfair to industry in that it is not conclusive, but it would put the burden on industry to prove by substantial evidence that a disease is not work-related.

Victoria Giammattei

133. *Id.*
134. Hearing on S.B. 763, before the California Industrial Relations Committee, May 29, 1970.
135. CAL. LABOR CODE §§ 3212, 3212.5.
136. 1965 CALIF. REPORT OF THE WORKMEN'S COMPENSATION STUDY COMMISSION, at 117-118.