6/23/67

Second Supplement to Memorandum 67-44

Subject: Candidates for position as Assistant Executive Secretary (Mr. Charles L. Swezey)

Mr. Swezey ranks second on the eligible list for this position.

Attached is his statement of his educational background and work experience and several samples of his writing.

Respectfully submitted,

John H. DeMoully
Executive Secretary

RESUME OF EDUCATION AND PROFESSIONAL EXPERIENCE

of

CHARLES LAWRENCE SWEZEY

RESUME OF EDUCATION AND PROFESSIONAL EXPERIENCE
of
CHARLES LAWRENCE SWEZEY

EDUCATION:

I received my A.B. degree in 1943 from Cornell University, where I was a member of Phi Beta Kappa, and my L.L.B. in 1948 from Stanford, where I was elected to the Order of the Coif.

LAW CLERKSHIP:

From shortly after my graduation from Stanford until May of 1950, I served as research assistant and research attorney on the staff of Justice Spence of the Supreme Court of California. While there I prepared a conference memorandum in every seventh case filed with the court. I also drafted concurring and dissenting opinions and did other research as assigned.

The conference "memos" were succinct (2 to 6 page) descriptions of the procedure, facts, law and arguments in each case. They were designed to quickly provide the justices with sufficient information about each petition for hearing or original writ to enable them to decide whether the petition should be granted. An example of a conference memorandum is attached as Appendix A.

TEACHING EXPERIENCE:

During the period I was on the staff of Justice Spence, I also taught the course in Trusts at San Francisco Law School.

CIVIL PRACTICE:

From May, 1950, until December, 1953, less a 17 month military leave, I was in general civil practice with Mitchell, Silberberg and Knupp in Los Angeles. The standards of this firm were extremely high. I drafted pleadings, motion picture contracts, business agreements, wills and real estate documents. I also wrote briefs, tried cases, probated estates, supervised corporate transactions and participated in nearly every type of civil matter except divorce litigation.

ADMINISTRATIVE LAW:

From December, 1953, until July, 1954, I was prosecuting attorney for the Division of Real Estate. As Deputy Real Estate Commissioner, I prepared statements of charges and statements of issues in accordance with the Administrative Procedure Act and tried cases involving license applications and violations of the Real Estate Law.

The following year was spent as a referee for the Unemployment Insurance Appeals Board. In this position I heard and decided an average of about 20 cases each week. A sample decision is attached as Appendix B. I also worked two months as an opinion writer for the Board.

INSURANCE AND EXECUTIVE EXPERIENCE:

From July, 1955 to July, 1957, I was employed as senior counsel for the State Compensation Insurance Fund which is the largest workmen's compensation insurance carrier in California. As senior counsel, I supervised the Northern California and home office legal staffs in the performance of all the legal functions involved in the operation of an insurance organization of this nature.

QUASI-JUDICIAL EXPERIENCE:

Since 1957, I have been a referee for the Industrial Accident Commission which is now known as the Workmen's Compensation Appeals Board. In this position I hear and decide approximately 50 compensation cases each month. As a part of the decision making process the referee is required to summarize the evidence, write an opinion on decision and prepare findings. The findings, awards and orders are essentially the same as the findings of fact, judgments and orders issued by the Superior Court except that they are drafted by the referee rather than counsel. An example of an opinion on decision is appended. (Appendix C) A referee's decision is "appealed" by means of a petition for reconsideration by the Workmen's Compensation Appeals Board itself. Whenever such a petition is filed in one of my cases, I prepare a report of referee on reconsideration. An example of such a report is attached as Appendix D.

As an additional duty, I am in charge of the San Jose office and supervise a staff of 21 which includes clerks, legal stenographers, court reporters, lawyers and a doctor.

LEGAL WRITING FOR PUBLICATION:

I was one of the authors of California Workmen's Compensation Practice published by the University of California. A reprint of my chapter is being forwarded separately. My article on "Disease as Industrial Injury in California" is appearing in the current edition of the Santa Clara Lawyer published by the University of Santa Clara. A copy of the final draft (without footnotes) is attached as Appendix E.

COMMITTEE OF BAR EXAMINERS:

For the past 13 years I have served as a reader in Real Property, Evidence and Torts for the Committee of Bar Examiners. As a part of the preparation for reading each question, the reader prepares a legal analysis of the question. I have also drafted several questions and analyses of the legal principles and theories involved in each.

APPENDIX
A

GEORGE v. BEKINS VAN & STORAGE CO.

2 Civ. No. 16182

CONFERENCE: THURSDAY, September 30, 1948

Petition for hearing after decision by the D.C.A., Second District, Division Three (Opinion by Shinn, Acting P.J.), affirming judgment for plaintiffs in an action against warehouseman for damages for destruction of goods by fire. (Superior Court, Los Angeles County, Harold B. Jeffery, Judge.)

Sometime in October of 1943, plaintiff wife wired defendant from Oregon, where her husband was preparing for overseas duty, "Wire immediately if you will store my five rooms of valuable furniture." An affirmative reply was received and the goods were shipped to defendant at Los Angeles by the Navy. About a month after receiving the goods defendant mailed a non-negotiable warehouse receipt to the plaintiff wife along with a "salmon identification card" which plaintiffs signed and returned to defendant. Both the receipt and the card purported to limit defendant's liability to $10 per 100 lbs. The shipment weighed approximately 5,000 lbs.

The goods were destroyed by fire on May 16, 1945, and this litigation followed. At the trial two members of the Los Angeles arson squad testified over objection that the fire was caused by negligent smoking. This opinion was based in part upon hearsay. There was much other evidence both ways on the question of

negligence, mostly in regard to the condition of the building and fire prevention measures. The trial court found that plaintiffs had not consented to the limitation on liability and gave them judgment in the amount of $3,126.15. The recovery was based on conversion, negligence, and breach of contract to use due care.

Defendant then appealed to the D.C.A. That court affirmed the judgment stating that while no cause of action for conversion was made out, there was ample in the record to support the judgment on the theory of breach of contract. The opinion pointed out that under such theory the burden of proof of lack of negligence was on the warehouseman and that defendant had failed to sustain that burden. The D.C.A. declined to decide whether or not plaintiffs would have been entitled to recovery on the theory of negligence.

It was further held by the D.C.A. that the admission of the opinion based on hearsay was not prejudicial because competent evidence on the subject was later introduced curing such defects, and that the limitation on liability was not binding upon the plaintiffs because it was not "fairly and freely entered into."

Defendant now petitions this court for a hearing. Its contentions, all of which were made to the D.C.A., are: (1) that the burden of proof of due care was improperly placed upon it; (2) that the admission of expert opinion based on hearsay was prejudicial; (3) that judgment for more than the declared value of goods contained in a storage contract is improper.

(1) If a warehouseman fails to deliver goods the burden

is upon him to establish the existence of a lawful excuse for such refusal. (Uniform Whse. Receipts Act, sec. 8 [3 Deering Gen'l Laws, Act 9059].) It is not clear from this provision whether the burden of proof on the issue of negligence is on the depositor or upon the warehouseman. Vol. 3 of U.L.A. cites California cases for both propositions. Apparently the law in this state is that where plaintiff's theory is conversion the burden is upon the bailee to show his lack of negligence (Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 706), but where plaintiff bailor seeks to recover upon the theory of negligence the burden of proving the bailee's negligence is upon him (Wilson v. So. Pac. R.R. Co., 62 Cal. 164, 168; 25 Cal. Jur. 964). There seem to be no cases in California as to where the burden is if the plaintiff's theory is breach of contract to use due care. It would seem that the plaintiff would have the affirmative of the issue of negligence here just as much as he would in the case where he seeks to recover in tort for defendant's failure to use due care, but the D.C.A. accepted the rationale of cases in other states which put the whole burden on the warehouseman on the basis of sec. 8 of the Whse. Receipts Act and upon some theory similar to res ipsa loquitur. (Petition, Opinion, pp. 7,8.) Other states take an equally tenable view: That the warehouseman satisfies the burden of sec. 8 when he says that the goods were destroyed by fire and that the depositor must then show that the warehouseman was at fault. (3 U.L.A. 39.)

[The findings (Cl. Tr., p. 60) and the D.C.A. opinion speak of it being a contract to "keep safely," but the evidence will not support such a finding. If defendant had contracted to keep safely, its liability would have been absolute and the fire would have been no excuse.]

(2) Petitioner's second point is apparently without merit. There is no iron-clad rule that an expert cannot give an opinion based in part upon hearsay. (Hammond Lumber Company v. County of Los Angeles, 104 Cal. App. 235, 248.) But even if this opinion was inadmissible for that reason, it was not prejudicial because, as the D.C.A. points out, the bulk of the hearsay upon which the opinion was based came in later as direct testimony. (See Nelson v. Painless Parker, 104 Cal. App. 770, 778.) Furthermore, this case was tried without jury, and in such cases it is presumed that the judge relied upon the competent evidence where it was sufficient to support the findings. (Roy v. Salisbury, 21 Cal. 2d 176, 187.)

(3) "The taking of a warehouse receipt, like the taking of a bill of lading, binds the bailor as an acceptor of the terms therein legibly stated." (1 Williston on Contracts, Rev. Ed. 266, citing Taussig v. Bode, 134 Cal. 260.) The purported limit on liability in the warehouse receipt here in question can hardly be said to be illegible. (See Cl. Tr., p. 34.) Taussig v. Bode and other cases in accord in California can, however, be distinguished from the instant case, as those cases apparently did not involve dealing by mail. This is perhaps a thin distinction.

The instant case seems stronger than that envisaged by Professor Williston, as plaintiffs acknowledged receipt of the warehouse receipt by signing and returning the salmon card. (Rep. Tr., pp. 187-200.)

The warehouseman undoubtedly does occupy a position of dominance in these cases and the courts have often recognized this. They have said that the bailee cannot so limit his liability where he has actual knowledge that the thing bailed is of greater value. (England v. Lyon Fireproof Storage Co., 94 Cal. App. 562, 573.) Courts of sister states have said that the limitation on liability must be brought home to the bailor. (3 U.L.A. 1947 Pocket Part, 14.) But the defendants in this case do not appear to have taken any undue advantage of this position of dominance.

The effect of the D.C.A. decision is to make the warehouseman virtually an insurer for an unlimited amount whenever the bailor deals with him by mail. This appears to be out of line with the policy of this state which allows the bailee to limit his liability (McMullin v. Lyon Fireproof Storage Co., 74 Cal. App. 87, 100; Warehouse Receipts Act, supra, sec. 3; cf. Civ. Code, sec. 1840), and which is that a bailee will only be liable for failure to use due care. (Whse. Receipts Act, supra, sec. 21.)

Page v. Ace Van and Storage Co., 87 A.C.A. 366, decided by the Fourth District two weeks after the principal case, apparently cannot be reconciled except on the personal dealing basis.

Granting recommended.

S P E N C E, J.

APPENDIX B

STATE OF CALIFORNIA
DEPARTMENT OF EMPLOYMENT

DIVISION OF APPEALS
SAN FRANCISCO AREA REFEREE OFFICE

In the Matter of:

Donald C. Philbrick, dba
Philbrick Sawmill
Comptche, California

Petitioner

Account No. 028 7896

Department of Employment

Respondent

REFEREE'S DECISION
SF-T-8

Date Petition Filed:
January 15, 1954

Time and Place of Hearing:
(1) September 21, 1954
Ukiah, California
(2) November 16, 17 and 18, 1954
Fort Bragg, California

Parties Present:
(1)&(2) Petitioner
Respondent

PETITION FOR REASSESSMENT UNDER SECTION 1133 OF THE CODE

Based on the record before him, the Referee's statement of fact, reason for decision and decision are as follows:

STATEMENT OF FACT

Petitioner, who is engaged in logging, has protested an assessment levied by the Department of Employment under Section 1127 of the Unemployment Insurance Code with respect to the period from October 1, 1950 through September 30, 1953 in the amount of $943.76 contributions, $72.53 penalty, plus interest as provided by law. The assessment is based upon sums paid to fallers and buckers, employed by petitioner, as equipment rental which the Department asserts are in fact wages. The penalty covers only the period commencing July 1, 1952.

During the year 1950 petitioner allocated 20 percent of the individual earnings of the fallers and buckers (also called "choppers") to equipment rental. During the first calendar quarter of 1951 rental payments of $2.50 per thousand board feet were made. From April 1, 1951, through June 30, 1952 equipment rental in the amount of $0.75 per thousand board feet was paid. Thereafter, $2.50 per hour was allocated to "wages" and the remainder of the remuneration received by the choppers was considered as equipment rental; the basic rate for computation of such compensation was $5.00 per thousand board feet of Redwood (including peeling off bark) and $3.50 per thousand board feet of fir (requires no peeling). Petitioner continued paying contributions on this basis after being advised by the Department on July 25, 1952 that the Department would disallow saw rental in excess of 20% gross remuneration for falling and bucking. In making the assessment here involved the Department considered as taxable wages that portion of equipment rental which exceeded $0.50 per

DATE OF MAILING: JAN 31 1955

thousand board feet for the period prior to July 1, 1952, and that portion which exceeded 20 percent of the total remuneration for chopping on and after that date. In addition, the Department treated the entire compensation during the first three quarters of 1953 as wages on the ground that petitioner's records were inadequate to show what amounts represented expenses and remuneration for services respectively.

Petitioner contends: (1) that the amounts paid by it for equipment rental were not in repayment of expenses incurred by his employees but were rental payments unrelated to the contract of hire; (2) that to treat any portion of the equipment rental payments as "wages" constitutes an impairment of contract; (3) that the allowances arrived at by the Department are arbitrary and unreasonable; and (4) that petitioner's records were adequate to determine for the year 1953 what sums were rental and wages respectively.

The cutting and preparation for processing of timber in petitioner's operation was performed by fallers and buckers (or choppers) who furnished their own chain saws, parts, gasoline, oil, axes, wedges and other equipment and supplies. Each also generally had a truck or work car used to transport personnel and equipment to and from the woods.

During the latter part of the period involved in the assessment there was in effect between petitioner and Lumber and Sawmill Workers Local 2610, which represented his employees, an agreement providing, among other things;

> "Two Dollars and Fifty Cents ($2.50) per hour. . . will be paid to all (fallers, buckers and peelers employed by petitioner).
>
> "In order to provide for payment of power equipment when it is furnished by the employee rather than the employer, the following rates will be paid for logs prepared:
>
> $5.00 per M. . .Redwood - Fallen, Bucked and Peeled
> 3.50 per M. . .Redwood - Fallen and Bucked
> 3.50 per M. . .Douglas Fir - Fallen and Bucked
> 1.50 per M. . .All Timber - Bucked only.
>
> ". . .after the Two Dollars and Fifty Cents ($2.50) per hour has been deducted from the above Log Payment the remainder shall be considered as a fair remuneration . . . . as Equipment Rental".

Petitioner also paid his fallers and buckers 18¢ per square foot for an operation known as "waste cutting".

There is very little evidence in the record as to what factors influenced the parties in negotiating the above-quoted provision of the union contract but it does appear that almost without exception the choppers prefer to provide their own equipment as it is more profitable for an experienced chopper to be paid by the board foot than by the hour.

A typical faller and bucker employed by petitioner, for example, cuts an average of 15,000 feet of timber per day and works 200 days per year. Thus, without reference to any remuneration for peeling, he would gross $10,500 providing his own equipment but only $4,000 on an hourly basis. The expenses of acquiring and maintaining the equipment, of course, are not negligible. His initial outlay for saws

and equipment is approximately $1100.00, plus whatever he expends for a truck or work car. During the period covered by the assessment his annual expenses, including replacement of saws and maintenance of his truck, would approximate $1120.00. The truck or work car is essential to a successful falling and bucking operation but only about one fifth of the use thereof could be considered as a necessary business expense, the remaining four-fifths being exclusively for "going and coming" or commuting. A typical chopper would pay $2100 for such a car and amortize it over a 3 year period, although some choppers invested as little as $390 in their vehicles.

During the year 1953, petitioner kept semi-monthly pay roll sheets which indicated whether the employee was a peeler or chopper; the number of hours he worked; number of board feet falled and bucked or peeled, as the case may be; the number of square feet waste cut; and rate for cutting out unusable wood; the total payment; the hourly "wage"; and the amount ostensibly paid as "equipment rental". There was no summary of this data except insofar as it appeared on the petitioner's quarterly unemployment insurance tax returns.

REASON FOR DECISION

At all times herein involved, Section 11 of the Unemployment Insurance Act provided, insofar as is material to this decision:

> "(a) Except as hereinafter in this section provided the term 'wages' means:
>
> "(1) All remuneration payable for personal services whether by private agreement or consent or by force of statute including commissions and bonuses, and the cash value of all remuneration payable in any medium other than cash."
>
> "(b) The term 'wages' does not include the actual amount of any required or necessary business expense incurred by an individual in connection with his employment, or, in lieu of the actual amount of such expenses, the reasonably estimated amount allowed therefor in accordance with the authorized regulations as may be prescribed."

Section 64 of Title 22 of the California Administrative Code provided in part as follows:

> "(a) 'Taxable wages' does not include the actual amount of traveling, automobile and other necessary or required business expenses incurred by an employee in connection with his employment and the reasonable rental value of equipment or supplies furnished by an employee to his employer; provided, however, that the employee shall maintain such reasonable records as will enable him to account to his employer for the amount of the rental or expenses actually incurred by him and that the employer shall keep such reasonable records as will show the portions of the total amount which represent respectively expenses and remuneration for services.
>
> "(b) The accounting between the employee and his employer shall be accomplished for periods not greater than a calendar quarter and not less often than once each quarter so the employer may have knowledge of that portion of the payment which is remuneration for personal services for the purpose of properly preparing the quarterly contribution and earnings returns.
>
> "(c) Nothing herein shall preclude a reasonable flat daily, weekly or monthly allowance to cover traveling and similar expenses actually

incurred and not in fact remuneration for services performed. Where the employer computes expenses on a fixed flat allowance basis, the employer must, at all times, be prepared to substantiate the amount claimed to be expense items and to show that no part of it represents additional remuneration for employment. A statement of expenses by the employee shall constitute a rebuttable presumption that the employer has complied with this section."

****

"(e)Regardless of any of the methods used in computing expenses, whenever an item is questioned, the burden of proof shall be entirely upon the employer to establish the correctness of the expenses to the satisfaction of the department. Unless it can be established to the satisfaction of the department that the amount claimed represents only actual reimbursement for usual and necessary expenses incurred in the course of the worker's employment, all or any part of the expenses may be disallowed."

Wherever an item is questioned, the burden is entirely upon the employer to establish the correctness of the expenses to the satisfaction of the Department. The Department may disallow all or any portion of the amount claimed unless the employer can establish that the amount claimed represents only actual reimbursement for usual and necessary expenses incurred in the course of the worker's employment. The burden of proof was upon the petitioner to establish that the part of the equipment rental disallowed represented something other than wages (Appeals Board Tax Decisions Nos. 1923 and 2053).

At first blush, Section 64(a) would appear to exclude from wages "the reasonable rental value of equipment or supplies furnished by the employee", but reference to Section 11(b) of the Act, under the authority of which Section 64 of Title 22 was promulgated, indicates that it was concerned only with "necessary business expense incurred by an individual in connection with his employment" or a "reasonably estimated amount allowed therefor". Thus the "reasonable rental value" referred to in Section 64 is an estimated allowance arrived at in accordance therewith. Under Sections 11(b) and 64, only the amount of required expenses actually incurred by an employee in connection with his employment were excluded from taxable wages (Appeals Board Tax Decision No. 1923).

Petitioner, however, contends that Section 64 of Title 22 was inapplicable to the facts now before the Referee and that the entire amount of the equipment rental was not subject to contributions since it was not "remuneration for personal services" but, as its name implies, rental for equipment. While it is true that a benefit conferred upon an employee is not "wages" unless it was intended as remuneration under a contract of hire (Appeals Board Tax Decisions Nos. 1239 and 1040); petitioner has not established that the so-called equipment rental was not wages. The supplying of the equipment by the choppers cannot be isolated from their performance of services; petitioner bargained primarily for services and the equipment was incidentally supplied with the amount of rental paid bearing little relationship to the value of the equipment. Thus a novice or inefficient chopper who cut 5,000 board feet of fir in an eight-hour day with new equipment would receive no rental for his equipment, while an experienced chopper using second-hand, borrowed, or even rented equipment and cutting 20,000 board feet would receive $50 in "equipment rental". The saws and other tools, moreover, would be valueless to petitioner without the services of their owners, and petitioner would have been less than astute to annually pay $6,500 rental

for equipment which he could purchase initially for $1100 and maintain (including replacement) for another $1100 per year. Under the circumstances, the conclusion is inescapable that at least a substantial portion of the equipment rental was wages within the meaning of the Act.

Turning now to the contention that the contract between the union and petitioner is binding upon the Department, it should be noted that a similar argument was rejected by the California Unemployment Insurance Appeals Board on a substantially identical set of facts in Appeals Board Tax Decision No. 1824. It is well settled, moreover, that a contract specifying a relationship to be one thing is not controlling where the extrinsic circumstances show it to be another (Appeals Board Tax Decision No. 2068). As was recently held with respect to a collective bargaining contract, "Whatever may have been the effect of said provision of the contract as between the parties thereto, it is our opinion that such provision is not binding upon the Department or this Appeals Board as to the status or effect of (severance pay) under the Unemployment Insurance Code." (Appeals Board Benefit Decision No. 6154) The constitutional issue raised by petitioner was put to rest by the United States Supreme Court in West Coast Hotel Company v. Parrish (1937), 300 U.S. 379, 57 Sup.Ct. 578, and Home Building and Loan Ass'n. v. Blaisdell (1934), 290 U.S. 398, 54 Sup.Ct. 231. It should be observed, moreover, that neither the Act, the regulations, nor the assessment require any party to the contract to do anything inconsistent therewith nor in any way restrict their rights to enter into other contracts for compensation. They simply determine what portion of payments made thereunder are subject to unemployment insurance contributions in accordance with a standard of uniform application.

In urging that the equipment rental allowances arrived at by the Department were arbitrary and unreasonable, petitioner's emphasis was upon attacking the manner in which the Department reached its conclusion rather than upon the validity of the conclusion. Even if it appeared that the Department had cast lots to ascertain its allowable equipment rental, petitioner would not, in the opinion of the Referee, have sustained his burden unless he also established that the usual and necessary expenses incurred by the fallers and buckers in the usual course of their employment exceeded the flat rate allowed by the Department. The evidence indicates that a typical chopper employed by petitioner annually cuts 3,000,000 feet of timber and expends $1120.00 for the maintenance and operation of his equipment and work car and replacement of equipment. $110, which would represent the annual interest expense at the maximum legal rate of interest on the claimant's initial investment in equipment other than the work car, and $140 for amortization of that portion of the claimant's work car used exclusively in the course of the chopper's employment might also be properly considered as usual and necessary expenses, if expended. Thus, the chopper's total annual required business expenses would not exceed $1370 or less than 46¢ per 1,000 board feet. Prior to July 1, 1952, the Department allowed 50¢ per thousand board feet and thereafter allowed 20% of the total remuneration for chopping. While it would appear that a reasonable rental allowance should be dependent upon the amount of timber cut and not upon the amount of remuneration, in the case of the petitioner's fallers and buckers, the 20% allowance as applied by the department amounted to a flat 70¢ per thousand. Since both amounts exceeded the actual amount of the necessary or required business expenses per 1,000 board feet cut incurred by petitioner's employees, the Referee concludes, as did the Appeals Board in Tax Decisions Nos. 1590, 1664, 1824, and 1923, that the Department's determination was reasonable.

Petitioner's final contention appears to have merit. It was ascertainable from petitioner's records the amount of redwood each chopper chopped and peeled, the amount of redwood and fir merely fallen and bucked, the total wages paid, and the amount thereof which petitioner allocated to "equipment rental" and to "wages" as

those terms were used in the union contract. Respondent, in its brief, conceded that an expense allowance could have been computed from these records but that the computation would have required more time than the Department considered appropriate for the audit. The Referee cannot agree that this constituted good cause for the disallowance of "equipment rental" for the period involved. Since the Department determined that petitioner was entitled to consider 70¢ of each $3.50 paid to an employee for falling and bucking a thousand feet of timber as equipment expense, petitioner's records were adequate to reflect the amount of remuneration paid each employee which is properly allocable to the reasonably estimated amount allowed for equipment expense.

The foregoing discussion treats the principal contentions made by petitioner in this case. There are, however, several matters which require decision in order to properly dispose of all of the issues involved in the case. Since peelers use only a peeling bar, the expenses of acquisition and maintenance of which are relatively negligible, the entire remuneration paid for peeling was wages. The waste cutting done by the fallers and buckers being incidental to the chopping of the timber and the rental allowance determined by the Department as proper, having covered the full amount of the employees' equipment expense, no additional equipment expense was allowable for waste cutting in the absence of evidence showing that any additional expense was actually incurred as a result of such waste cutting.

Section 1127 of the Code provides, as did its predecessor, Section 45.5(b) of the Act, that if a deficiency is due to negligence or intentional disregard, a penalty of ten percent of the amount of the deficiency shall be added to the assessment. The preponderance of the evidence indicates that although the Department advised petitioner's accountant on July 19, 1952, that the Department would not allow equipment rental in excess of 20% of the gross remuneration paid fallers and buckers, petitioner continued to report equipment expense in excess of that amount. This, in the opinion of the Referee, constituted negligence, if not intentional disregard, of the Act and regulations promulgated thereunder (Appeals Board Tax Decisions Nos. 1923 and 2030). Petitioner could have protected his rights by paying the additional sums and filing a claim for refund.

DECISION

The petition is granted with respect to that portion of the assessment for the year 1953 which was based upon the Department's conclusion that it could not be ascertained from petitioner's records what portion of employees' gross remuneration was paid for falling and bucking services, and is denied in all other respects. The Department shall recompute the contributions due for the first three quarters of 1953, allowing petitioner not less than 46¢ per thousand board feet of timber fallen and bucked as reasonable and necessary business expense incurred by the individual or individuals falling and bucking such timber.

Dated at San Francisco, California, January 25, 1955.

C. L. SUEZEY, Referee

APPENDIX C

KEATON, Sharon Kathleen and Edith Frances vs. LASCO MARINE AND INSURANCE COMPANY OF NORTH AMERICA

C. L. SWEZEY, Referee
November 10, 1964

Claim No. 64 SJ 14166
Injury: March 19, 1964
March 23, 1964 (Death)

MEMORANDUM OF DECISION

JURISDICTION:

The facts with respect to this issue are not in dispute. Deceased fell from a boat which had never previously been in the water while it was attached to a crane for launching. He fell into navigable waters. It is defendants' contention that the injury was of a maritime nature and beyond the jurisdiction of the Industrial Accident Commission.

While it is true that Federal jurisdiction is exclusive where an injury properly falls within the maritime jurisdiction of the Federal courts, certain injuries of a maritime nature are not beyond the jurisdiction of the several states. (52 Cal. Jur. 2nd 42.)

Thus, the workmen's compensation law of a state has been applied in the case of an injury received by an employee while working on the construction of vessels before launching (Employers Liability Assurance Corp. v. I.A.C and Mann, 5 I.A.C. 72), of a machinist engaged in installing machinery in a vessel afloat but uncompleted (Los Angeles Ship Building and Dry Dock Co. v. I.A.C. and Ruan, 9 I.A.C. 90) and of a shipyard employee whose work was for the major part on shore but was injured while he was working on a commissioned vessel being repaired in navigable waters (Baskin v. I.A.C., 15 I.A.C. 112).

Traditionally, it was held that the point from which the injured workman was precipitated determined jurisdiction. (2 Hanna, Law of Employee Injuries 405.) Injuries occurring on the land or any extensions thereof are within the exclusive jurisdiction of the state unless the injured is a seaman. Objects attached to a boom are extensions of the land. (The Sumaco, 4 Fed. 2nd 617.)

It has been held that where there is no clear demarcation between state and federal jurisdiction, the applicant has the privilege of proceeding either under the state compensation laws or the Federal Longshoreman's Act. (Hanna, op. cit. 405) Applying the foregoing principles to the facts before us, it seems clear that the Commission has jurisdiction.

DEPENDENCY:

Labor Code Section 3501 provides that a child under the age of 18 years is conclusively presumed to be dependent upon a parent who was legally liable for the maintenance of the child at the time of the injury if

there is no surviving dependent parent. This presumption applies to both of the applicants herein, and they will be awarded the full death benefit of $17,500.00.

It appears in the best interest of the applicants that one-half of the death benefit be paid to the guardian to be applied in her sound discretion for the use and benefit of Edith Frances Keeton so long as Edith continues to reside with the guardian.

The other one-half of the death benefit will be ordered paid to the guardian with instructions that she turn over the payments as received to Sharon Kathleen Keeton until further order of the Commission or until they are exhausted.

BURIAL EXPENSE:

Burial allowance in the amount of $345.64 will be awarded payable to Cosnlo, Lind, Holler and Hapgood.

ATTORNEY FEE: $750.00.

C. L. SWELSY, Referee
INDUSTRIAL ACCIDENT COMMISSION

CLS:vk

APPENDIX D

Workmen's Compensation Appeals Board
of the State of California

Case No. 66 SJ 18485

Morgan D. Symons,
Applicant,
vs.
Balcon's Department Store and
Fireman's Fund Insurance Company,
Defendants.

REPORT OF REFEREE ON PETITION FOR RECONSIDERATION

Defendant insurance carrier has filed a timely Petition for Reconsideration from Findings and Award in the case of a 39 year-old laborer who injured his eye when a nail he was hammering flew up and struck him.

Contention:

Petitioner contends that the Referee erred in finding that applicant was a general employee of Balcon's Department Store which it insured.

The Facts:

Applicant, who had previously done odd jobs on a casual basis for the Balcon's, was hired by Balcon's

Department Store on October 1, 1963 as a regular part-time employee.

His duties required him to clean up the store, break up boxes and do other work which was too heavy for Mrs. Balcon. He reported to the store every afternoon when he completed his regular work for Pacific Gas & Electric Company.

Balcon's Department Store is a corporation which, with exception of one share, was wholly owned by Vern and Nell Balcon. When applicant was hired, the Balcons were building a house. Mr. Balcon told applicant that if he wanted additional work, he could come to the house when he finished at the store. Applicant did this several evenings, and it was in the course of working at the house that he injured his eye.

Applicant was paid on the payroll of Balcon's Department Store for the work he performed both at the store and at the house. Vern Balcon testified that in his mind there was no difference between the money in his pocket and the money at the store.

The Law:

The insurer of a general employer is liable for the entire costs of compensation unless the special employer has the employee on his payroll. (55 Cal. Jur. 2d 68; Cal. Workmen's Compensation Practice, p. 68.)

Discussion:

It is apparent from the facts summarized above that applicant was at the very least a general employee of petitioner's insured at the time of his injury.

Since he was on the corporation's payroll, petitioner is liable for the entire cost of the compensation.

It should be noted, moreover, that there is convincing evidence that Vern Balcon had ordered a compensation policy covering the construction of the house from petitioner's agent well before the accident occurred. Petitioner, therefore, is probably estopped to deny coverage in any event.

Recommendation:

Denial.

C. L. Swezey, Referee

CLS:vk

Served by mail on all attorneys listed on Official Address Record.

Sept. 16, 1966.

Case No. 66 SJ 18485

APPENDIX E

DISEASE AS INDUSTRIAL INJURY IN CALIFORNIA

By Charles Lawrence Swezey*

The English Workmen's Compensation Act of 1906 specified that a compensable harm must be either a physical injury by accident or one of six listed industrial diseases. (1) Most of the early statutes in the United States were limited expressly or by judicial interpretation to accidental injury. (2) Eventually coverage in all but three states was extended to encompass occupational diseases. Some jurisdictions, in the manner of the English act, schedule the specific occupational diseases, and frequently the industry, which are covered. Nearly thirty now provide for general coverage. (3)

California's first compulsory workmen's compensation act which was enacted in 1913 allowed compensation only where an employee sustained a personal injury by accident. Because the phrase "by accident" was thought to exclude occupational diseases, the law was amended in 1919 to eliminate these words and to provide for compensation for any injury arising out of and in the course of the employment. (4)

Two years later California became one of the first jurisdictions to expressly cover disease in general terms when the Workmen's Compensation Insurance and Safety Act of 1917 defined injury as including "any disease arising out of the employment." (5) This definition presently appears in Section 3208 of the California Labor Code. Disease is also mentioned in three other Labor Code sections: Section 4663, which provides that in the case of aggravation of a pre-existing disease compensation is recoverable only for the portion of the disability attributable to the aggravation; Section 5412, which defines the date of injury in occupational disease cases; and Section 5500.5, which sets forth the procedure for the trial of a claim for occupational disease arising out of more than one employment.

The Labor Code, however, contains no definition of disease. The word is commonly defined as "any illness or departure from health" or, more specifically, a particular destructive process in the body with a specific cause and characteristic symptoms. (6) A physician would probably say that a disease is a "definite morbid process having a characteristic train of symptoms which may affect the whole body or any of its parts and the itiology, pathology and prognosis of which may be known or unknown." (7) Since Labor Code Section 3208 places injury and disease in the disjunctive, it is reasonable to assume that the word disease is not intended to include traumatic disturbances of bodily health.

California compensation decisions use the term disease in at least six different contexts: (1) occupational diseases; (2) other diseases arising out of employment; (3) aggravation of pre-existing disease by employment conditions; (4) aggravation of pre-existing disease by a specific incident of trauma; (5) disease proximately resulting from a traumatic injury; (6) disease causing injury in the course of employment.

In each of the six categories the ultimate result under California law is an award of compensation if the requisite facts are established. The theory and factual requirements may, however, vary depending upon how the disease contributes to the disability for which compensation is claimed.

Separate exploration of the six types of case reveals similarities from which basic principles can be drawn and facilitates consideration of certain special problems, such as apportionment and ascertaining the date of injury which are not ordinarily encountered in an uncomplicated traumatic injury case.

OCCUPATIONAL DISEASES

An appellate judge recently observed that "the term 'occupational disease' has not been defined either by the code or by authoritative judicial decision." (8) The same decision, however, cited Johnson v. Industrial Accident Commission (9) which described an occupational disease 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."

Since disease arising out of the employment has nearly always been compensable in California regardless of whether it is "occupational" or caused "by accident," the California courts have not had cause to discuss the question of what an occupational disease is to the extent that it has been labored in other states. (10) They have, however recognized from the outset that diseases arising out of employment fall into two classes: (1) industrial or occupational diseases which are the natural and reasonably to be expected results of a workman following a particular occupation for a considerable period of time, and (2) other diseases which are the result of some unusual condition of the employment. (11)

Silicosis (12), wheat allergy (13), glass blowers' arm (14), and lead poisoning (15) have been treated as occupational diseases by appellate courts. Cancer caused by a blow (16), poliomyelitis from a single exposure (17) and an injury to the back as the result of using a jackhammer on a specific date (18) have been held not to be occupational diseases. The Industrial Accident Commission (19) has considered asbestosis (20), emphysema superimposed upon silicosis (21), lead poisoning (22), encephalitis lethargica (23), dermatitis (24), undulant fever or brucellosis (25), giant emphysematous bullae (26), berylliosis (27) and hearing loss (28) as occupational diseases. An early case even held a policeman's flat feet, which developed over a five-year period, to be an occupational disease since his employment especially exposed him to the danger of such injury. (29) Wood alcohol poisoning (30), ulcers (31) and ruptured intervertebral discs (32) have been determined not to be occupational diseases.

The Industrial Accident Commission has vacillated on the question of whether tuberculosis is an occupational disease. It initially held that since tuberculosis was due to an infection at a specific time, it was more analogous to an accident than an occupational disease which appears as the result of accumulated exposure. (33) In Layden v. Industrial Indemnity Company, (34) however, a panel of three commissioners held tuberculosis resulting from an exposure to a fellow employee over a period of four years to be an occupational disease. Relying on some pre 1917 cases which confused the terms "occupational disease" and "disease arising out of the employment," (35) they concluded that an occupational disease did not have to be peculiar to the occupation in which the injured workman was employed. For reasons which do not appear in the official reports, the Layden case was not appealed. (36) Most recently, the commission returned to the position that an occupational disease must be incurred in an industry or occupational situation which is productive of an uncommon amount of the disease or which routinely constitutes a special hazard. (37)

Dorland's Medical Dictionary defines occupational disease simply as a disease caused by one's employment. It is perhaps regrettable that the Commission did not persist in its use of this simple definition. Adoption of such a definition, however, would require either legislative action or ignoring a substantial body of judicial authority since the courts have rather consistently assumed that occupational diseases have certain distinguishing characteristics. Among these are: (1) they are gradual in development although the rate of progress may vary; (2) there is usually a continual absorption of deleterious substances (39); (3) continuous exposure to a particular work situation finally causes physical breakdown (40); (4) the disease did not previously exist but builds up over a period of time (41); (5) they are the natural and reasonably to be expected results of following a particular occupation for a considerable period of time (42); (6) the first and early stages are not always perceptible (43); (7) they are peculiar to a given occupation (44); (8) they are latent and progressive. (45)

One authority in the field of workmen's compensation has indicated that it is probably misleading to quote indiscriminately from the old decisions, but he notes that one common element running through all of the definitions is a distinctive relation to the nature of the employment. He suggests that occupational disease should be defined to include any disease arising out of exposure to harmful employment conditions which are present in a peculiar or increased degree in contrast with other occupations or every day life. He observes that length of exposure is gradually being disregarded as an essential element of an occupational disease. (46) While this definition would probably not square with the language in some of the California decisions, its application to the various fact situations presented by the cases would not affect the ultimate results.

Radiation sickness, which has been a matter of much public concern in recent years, would undoubtedly be considered to be an

occupational disease unless the exposure is patent and consists of a single episode. There is a paucity of California authority on the subject. (47)

OTHER DISEASES

Diseases other than occupational diseases are said to arise out of the employment when they result from some unusual condition of the employment. Compensation is not payable, however, merely because the disease is contracted during the employment. There must be a cause and effect relationship between the employment and the disease. The employee's risk of contracting the disease must, because of his employment, be materially greater than that of the general public. (48)

This risk may be the risk of exposure to a contagious disease carried by a pupil of a school teacher (49), a patient of a hospital employee (50) or even a fellow employee in any industry. (51) Sometimes the increased exposure is the result of conditions of the employment such as poison oak (52), drafts (53), impure drinking water (54) or ring worm on the floor of a gentlemen's club. (55) Other times the special exposure results when the employee is sent to an area where there is an epidemic or endemic disease to which he has no resistance such as malaria, San Joaquin Valley fever or dysentery. (56) The epidemic may even be in the employer's plant. (57) If illness results from a vaccination or inoculation requested by the employer, the illness arises out of the employment. (58)

AGGRAVATION OF DISEASE BY CONDITIONS OF EMPLOYMENT

There is a maxim in workmen's compensation law that "Industry takes the employee as he is at the time of his employment" which is applied to hold the employer liable for industrially caused aggravation of an employee's pre-existing disease. Such an aggravation or acceleration of the pre-existing disease is considered an injury arising out of the employment causing the acceleration. (59)

A disease, however, which under any rational work is likely to progress so as finally to disable the employee does not become an injury merely because it reaches the point of disability while the employee is working. It is only when there is a direct causal connection between the conditions of the employment and the disability that an award of compensation can be made. (60) In each case it must be determined whether the disability resulted exclusively from the diseased condition or whether the employment was a proximate cause. If the proximate and immediate cause of the disability is the underlying disease, there is no recovery, even though the disability manifests itself in the course of the employment. (61) If, on the other hand, the disability is due entirely to the lighting up or aggravation of the pre-existing condition by the employment, the employer is required to compensate the employee for the entire disability. (62)

The leading case illustrating this type of injury is Fireman's Fund Indemnity Company v. Industrial Accident Commission and Gregory (63) where a representative of an employers' association suffered a stroke as a result of the strain and tension of 69 days of contract negotiations with certain labor unions. The medical testimony, although conflicting, established that the long hours of work and the tense conditions which surrounded them aggravated his pre-existing hypertension and precipitated a stroke. The award was based upon the rule that where an employee suffers disability brought on by strain and overexertion incident to his employment, there is a compensable injury even though the underlying disease previously existed and there is no traumatic injury. (64)

The same rule has been applied in the case of tuberculosis reactivated by weather and pressure changes and strenuous employment activity (65) and aggravation of a pre-existing heart condition into disability as the result of dumping 150 heavy sacks of peanuts every day, six days a week. (66)

A chronic disease which is now more prevalent than lung cancer and tuberculosis combined is pulmonary emphysema, an insidious and progressive lung disease of unknown etiology. Second only to heart disease as a cause of disability in workers from 50 to 64 years of age, it is subject to aggravation by exposure to respiratory irritants. When such irritants are inhaled because of employment conditions, any resulting disability is compensable to the extent of the aggravation. (67)

There is a familial tendency to emphysema and a statistical correlation between the disease and cigarette smoking. It may develop from allergic asthma. (68) If the allergic asthma is an occupational disease, the resulting emphysema should probably be treated as a proximate result of the occupational disease. (69)

AGGRAVATION OF DISEASE BY SPECIFIC INCIDENTS OF TRAUMA

The rule that the employer takes the employee subject to his condition when he enters the employment also applies where a specific traumatic episode lights up or aggravates a previously existing disease rendering it disabling. Again, liability for the full disability is imposed upon the employer even though the incident would have had little or no effect on a more healthy individual. Examples of this type of disease are reactivation of a latent tuberculosis by an employment connected assault, (70) the lighting up of a latent leutic condition by an injury, (71) a myocardial infarction resulting from lifting a 12 foot roll of linoleum, (72) the fracture by a lifting strain of a hip so weakened by Paget's disease that a spontaneous fracture could be expected at any time, (73) and the aggravation of a schizoid personality into a moderate schizophrenia by an injury which caused the loss of an eye. (74)

DISEASE AS A PROXIMATE RESULT OF TRAUMATIC INJURY

Frequently a traumatic injury will be complicated by a disease process which did not previously exist. If the disease which develops subsequent to the injury is a proximate result thereof, it is obviously compensable since the employer is liable for all disability and need for medical treatment proximately resulting from an industrial injury. Lockjaw from stepping on a rusty nail, (75) gonorrheal infection (76) or shingles (77) entering the system through an eye abrasion and mental deterioration from a blow on the head (78) are examples of this type of disease. The injury may also cause such a lowered resistance to infection that a subsequent infection is considered a proximate result of the injury. (79)

INJURIES CAUSED BY DISEASE

As mentioned above, a purely idiopathic illness which has no relation to the employment does not constitute an industrial injury even though it occurs in the course of the employment. In the early history of workmen's compensation in California, the Supreme Court applied this rule to the case of a workman who had an epileptic fit and fell 59 feet to the ground from a scaffold sustaining fatal injuries. (80) In later cases this harsh holding was modified, and it was decided that if some factor peculiar to the employment contributed to the injury, it arose out of the employment even though it had its origin solely in some idiopathy of the employee. Thus, it was held in National Automobile & Casualty Insurance Company v. Industrial Accident Commission and Honerlah (81) that a skull fracture suffered by an electrician during an epileptic seizure which caused him to strike his head against a saw horse was compensable. The saw horse was considered a special risk of the employment which contributed to the injury. Finally, in Employers Mutual Liability Insurance Company of Wisconsin v. Industrial Accident Commission and Gideon (82), the Supreme Court rejected the argument that it was necessary in idiopathic seizure cases for the fall to be from a height or against some object to establish a causal relationship between the employment and the injury. (83) Justice Carter, writing for a bare majority, pointed out that the causal connection between the employment and injury need only be contributory and that he could see no distinction between the idiopathic seizure cases and those in which an employee fell because of his own carelessness or innate awkwardness.

Although epileptic seizure cases are perhaps the most dramatic, the rules announced therein are equally applicable to the case where a truck driver has a fainting spell and is injured when his truck goes off the road or to the case of a telephone repairman who has a heart attack on top of a pole and falls off sustaining fatal injuries. (84)

CUMULATIVE INJURIES

Although they are beyond the scope of this article, some mention should be made of the "continuous cumulative" or "repetitive

trauma" injuries as it is frequently difficult to distinguish them from occupational diseases and aggravation of pre-existing diseases. This type of injury has long been recognized in California, (85) but experienced a renaissance in Beveridge v. Industrial Accident Commission. (86) In these cases the cumulative effect of a succession of slight or microtraumatic injuries, which individually are not disabling, ultimately results in disability. Thus, a car loader may as a result of constant bending and heavy lifting over a period of years cause the breakdown of an intervertebral disc or a cabinet maker may develop an elbow inflammation from repetitive sanding. Justice Tobriner eloquently described the process as follows:

> "We think the proposition irrefutable that while a succession of slight injuries in the course of employment may not in themselves be disabling, their cumulative effect in work effort may become a destructive force. The fact that a single but slight work strain may not be disabling does not destroy its causative effect, if in combination with other such strains, it produces a subsequent disability. The single strand, entwined with others, makes up the rope of causation. (87)

One California authority has observed that repetitive injuries can only be distinguished from occupational diseases by the type of pathology involved. (88) Such a distinction provides the only reasonable way of explaining why a hearing loss resulting from the repetitive trauma of sound waves beating on the ear drums is an occupational disease (89) while a ruptured disc resulting from constant and repetitive jarring of the spine is not. (90)

DATE OF INJURY

When the injury consists of or flows from a specific traumatic episode, the date of the incident is the date of injury. In the case of occupational diseases, contagious diseases with delayed periods of incubation, aggravation of pre-existing disease by employment conditions and repetitive trauma type injuries, no specific date can be readily fixed as the date of injury inasmuch as the injurious consequences of the exposure are the product of a period rather than a point of time. (91)

Ascertainment of the date of injury can be critical in a given case since it affects the time within which the action must be filed, the amount and nature of the compensation payable and the jurisdiction of the Workmen's Compensation Appeals Board. (92)

The law in force at the time of injury is taken as the measure of the injured person's right of recovery. (93) If an employee sustains a traumatic injury on a certain date, he is entitled to compensation at the rate provided by the law in effect on that date, but a problem arises in disease cases when a change in the law becomes effective between the date of exposure and the date of disability.

(94) Temporary disability indemnity is payable only during the five years immediately following the injury. (95) and the Workmen's Compensation Appeals Board loses jurisdiction to amend, alter or rescind its awards if a petition for such relief is not filed within five years from the date of injury. (96)

California courts initially considered that regardless of date of exposure to a disease, the employee had no cause of action and no rights accrued to him until that point in time when the disease resulted in a compensable disability. In Marsh v. Industrial Accident Commission (97) the Supreme Court announced that the date of injury should be deemed to be

> "... the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by theexercise of reasonable care and diligence, it is discoverable and apparent that a compensable injury was sustained in the performance of the duties of the employment."

Following this decision, it was generally considered that the date of injury in all cases was the date on which disability and knowledge that the disability was caused by the employment coincided.

In 1947 the following sections were added to the Labor Code:

> 5411. The date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed.
>
> 5412. The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment.

Since 1947, therefore, the date of injury in occupational disease cases has been different from the date of injury in other disease cases. In the latter cases, the date of injury is the last date of exposure, whether the exposure be to a contagious disease (98) or employment strains. (99) Concern has been expressed that application of Section 5411 to disease and repetitive trauma cases may result in the loss of a right before it accrues if the disability does not manifest itself until more than a year after the last exposure. (100) It was apparently this fear which motivated the Industrial Accident Commission to attempt to broaden the definition of occupational disease in the case of Layden v. Industrial Indemnity Co. (101) which was discussed above. In most cases, however, the last exposure and the first disability are sufficiently contemporaneous that no serious problem arises. (102)

Even where a clearly occupational disease is involved, establishment of the date of injury is not always easy. In addition to the factual issue of when the employee knows his disability is employment connected, there is a legal issue as to what constitutes "disability." This problem frequently arises in hearing loss cases where an employee in a noisy work environment becomes aware of a progressive hearing loss which he suspects is being caused by the noise of the employment. If his hearing were to be tested, his hearing loss might be sufficient to entitle him to a permanent disability rating, (103) but he is able to continue working without impairment of function or loss in wages. In this situation the Industrial Accident Commission has defined disability as either an actual loss in earning power or a limitation on the performance of his duties (104) or as an actual "incapacity to pursue his regular job." (105)

The foregoing definitions when applied to a case where the employee knows he has had a sufficient industrial hearing loss to qualify for permanent disability indemnity for longer than one year would seem to go beyond the language of Marsh v. Industrial Accident Commission (106) since the employee would have sustained a "compensable injury" when he first became entitled to permanent disability indemnity. (107) The answer may be that because the hearing loss is progressive, the injury does not become "permanent and stationary" until the exposure ceases. (108)

It is interesting to observe that the word "disability" as used in Labor Code sections 4751 and 4658 has been held not to require an actual loss of earnings. (109) The Commission, moreover, has taken the position that for the purpose of Section 4751 disability includes prospective loss of earning power and does not necessarily require actual work disability or loss of earnings. (110) The seeming inconsistency can be explained by the requirement in each case that the sections involved be "liberally construed .., with the purpose of extending their benefits for the protection of persons injured ... " (111)

APPORTIONMENT

Although, as has been seen above, the employer incurs liability whenever the employment causes or aggravates a disease, it does not necessarily follow that an employee's entire disability is the responsibility of the employer. Labor Code Section 4663 provides that compensation shall be allowed only for such portion of disability due to the aggravation of a prior disease as can be reasonably attributed to the injury. Labor Code Section 4750 provides that an employer is not liable for any permanent disability or physical impairment which existed before the injury. If, however, the employee's disability is due entirely to the lighting up or aggravation of a pre-existing condition by the industrial injury, the employer is required to compensate for the entire disability, and there can be no apportionment between the extent of the disability due to the injury itself and that due to the contribution of the pre-existing disease. (112) If, on the other hand, the resultant disability consists

partly of disability growing out of the injury (including the lighting up or aggravation of pre-existing disease) and partly of disability resulting from the normal progress of a pre-existing disease apart from the effects of the injury, the Workmen's Compensation Appeals Board must make an apportionment. (113)

Application of these principles is well illustrated by the facts in the case of Mary M. Harris (114) who had suffered from tuberculosis of the spine since childhood. Although her spine had been fused and she had marked disability, she was able to obtain employment as a sales clerk with Goodwill Industries, a corporation employing physically handicapped persons. In the course of her employment she fell from a stepladder and struck her right hip. The injury aggravated her pre-existing quiescent tuberculosis, and she became totally disabled. Since the temporary disability and the immediate need for medical treatment were the result of the fall and its aggravating effects on her pre-existing disease, the employer's insurance carrier was held liable for the entire amount thereof.

When the healing period was over and the injury became permanent and stationary, she was left with permanent disability consisting of the following: (1) the pre-existing disability; (2) any disability resulting from normal progress of the disease apart from the effects of the injury; (3) the disability directly attributable to the fall, and (4) the disability caused by the injury's aggravation of the pre-existing disease. The employer's insurance carrier was not liable for the first (115) and second (116) disabilities, but was for the third and fourth. (117)

Where the employee dies as a result of his injury, there is no apportionment, and the employer is liable for the entire death benefit even though the pre-existing disease would eventually have been fatal. (118)

LIABILITY OF PRIOR EMPLOYERS

Another facet of the apportionment problem in cases of occupational disease and progressive aggravation of pre-existing disease is the question of who is liable for compensation where the employee has worked for several employers during the period of exposure. As has been seen, a disease to be compensable must arise out of the employment, but this does not mean that a particular employment must be the sole proximate cause of the disease. As long as it substantially and proximately contributes to the disease, the employer may be held liable for the full disability attributable to the entire exposure. (119)

It is not uncommon for a miner or a construction worker to have worked for scores of different employers while developing an occupational disease. The procedure for handling this type of case was announced by the Supreme Court in Colonial Insurance Company v. Industrial Accident Commission and Pedrosa (120) as follows:

> "We believe the more workable and fairer rule to be in progressive occupational diseases that the employee may, at his option, obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability. To require an employee disabled with such a disease to fix upon each of the carriers or employers the precise portion of the disability attributable to its contribution to the cause of the malady is not in consonance with the required liberal interpretation and application of the workmen's compensation laws. The successive carriers or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better position to produce evidence on the subject and establish the proper apportionment. All of them may have contributed to the disability and the employee should be permitted to proceed against and have an award against any or all of them for the whole disability if the evidence discloses that he was exposed to silica dust during his period of employment with each of the employers named."

Since that case an employee disabled as the result of an occupational disease has had the right to proceed against any one or more of his successive employers (or their insurance carriers) and if the disability was contributed to by the employment, he could have an award against any or all of them for the whole disability. (121) In 1951 Section 5500.5 of the Labor Code was enacted to codify the rule of the Pedroza case (122) and to provide the details for the trial of occupational disease cases.

The decision in Fireman's Fund Indemnity Co. v. Industrial Accident Commission and Gregory (123) specifically authorized the use of this procedure in cases where a pre-existing disease is aggravated by cumulative exposures, and it is used by analogy in repetitive injury cases. (124) In this connection, there is an important difference between occupational disease cases and those involving aggravation of a pre-existing disease. In the former by definition the disease did not exist before the industrial exposure, (125) the exposure is peculiar to the occupation, (126) and there is no problem of apportionment except among the successive employers or insurance carriers. (127) In the aggravation cases, however, it is possible that the disease was causing some disability prior to the injury, that it is being aggravated by non-industrial factors. It is not necessarily true in this type of case that the employee can recover for his whole disability against any employer who contributed to the disability. The normal apportionment rules apply where the work aggravates a pre-existing disease. (128)

A SOCIAL PROBLEM

The rules precluding apportionment in death cases and making the employer fully liable for the aggravation by injury of a pre-existing disease undoubtedly produce a socially desirable result in individual cases. Whether this is equally true of their long range effect is open to serious question.

The basic concept of workmen's compensation laws is to shift the major portion of the burden of industrial diseases and injuries from the injured employees to industry and ultimately to the consumer as a part of the cost of the product or service. (129) The employer's share of this burden is a substantial business expense. The average workmen's compensation insurance premium cost in California probably exceeds $1.75 per $100 of payroll. (130) In the more hazardous industries the cost is substantially higher. (131) An employer with a low loss record and a safe operation, however, may reduce his compensation insurance costs by means of dividend plans, merit rating and experience rating. (132)

This possibility of reducing one cost of doing business provides an important incentive for the employer to conduct his operations in a manner calculated to minimize industrial injury, (133) but it also makes him reluctant to hire employees with diseases likely to be aggravated by injury or the occupational environment. Thus, people with heart ailments or degenerative intervertebral disc disease are frequently rejected in their search for employment, (134) and cost conscious employers are often somewhat less than enthusiastic about participating in "hire the handicapped" projects.

The obvious dilemma has been thoroughly debated and discussed but a solution acceptable to both industry and labor has yet to be proposed. (135) Until adequate remedial legislation is enacted, the lawyer for an injured employee must be concerned not only with securing an adequate award of compensation but also with advising the client as to his vocational future. (136)

CONCLUSION

In summary, the California workmen's compensation law provides general coverage for diseases arising out of the employment. An employer, or his insurance carrier, is liable for any disease caused or aggravated by the employment. He is not liable for pre-existing disability nor for disability resulting from the normal progression of a disease apart from the effects of the injury. In the case of an occupational disease or aggravation of a disease by extended exposure, the employee may recover for the entire industrial disability from any one or more successive employers or insurance carriers whose exposure contributed to the injury. The employers or insurance carriers so held may seek apportionment and contribution from the others in a supplemental proceeding.

The date of injury in occupational disease cases is the date on which actual or imputed knowledge of the cause of the disease coincides with disability. In other cases it is the date of the incident or exposure causing or aggravating the disease. If the exposure extends over a period of time, the last day of the exposure is the date of injury.

The practical lawyer will keep these basic principles and their various ramifications constantly in mind while preparing and trying an industrial injury case involving disease. The more academically inclined will look for clarification of the definitions of disability" and "occupational disease" from the Supreme Court but will not anticipate any judicial modification of the basic rules.

The Legislature, on the other hand, will continue to be under constant pressure to limit the rule that industry takes the employee as it finds him. Statutory amendments authorizing employees with pre-existing diseases to execute waivers, providing for apportionment of liability on the basis of contributing causes and establishing guidelines limiting liability in disease cases will be proposed by industry and opposed by labor. (137) The Legislature has thus far rejected numerous similar proposals, and it is doubtful that any major changes will be made in the near future unless they are a part of a major piece of legislation providing for the rehabilitation and reemployment of injured employees.