

# NOTE

## Curing Washington's Occupational Disease Statute: *Dennis v. Department of Labor and Industries*

### I. INTRODUCTION<sup>1</sup>

Under Washington's Industrial Insurance Act,<sup>2</sup> a disabled worker is eligible to receive disability benefits<sup>3</sup> if the worker's disability arises from what can either be defined as a work-related injury<sup>4</sup> or an occupational disease.<sup>5</sup> Because of these definitions, Washington's treatment of work-related disability claims is unique in comparison to the differing approaches taken by other states.<sup>6</sup> In most other states, the definitions of

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1. The author would like to thank the lawyers and staff members of the Tacoma, Washington firm of Small, Snell, Logue & Weiss, P.S., who, through their advice and support, contributed to this Note.

2. WASH. REV. CODE tit. 51 (1987).

3. See *Lenk v. Department of Labor and Indus.*, 3 Wash. App. 977, 478 P.2d 761 (1970). A worker is also entitled to receive treatment benefits if, as a result of an injury or occupational disease, he has a physical or mental condition that requires medical attention. This is regardless of whether there is any disability. Thus, an injury resulting in a cut finger would give rise to a claim for benefits. Treatment benefits would be given if the cut required medical treatment, i.e., stitches. Unless the cut rendered the worker unable to work (for any period of time exceeding three days) or resulted in permanent dysfunction, there would be a condition for which medical benefits would be payable, but no compensable disability. Therefore, even if a worker has suffered an injury or an occupational disease, disability benefits will not be provided unless the worker is disabled as a result of the injury or occupational disease. For ease of discussion, however, all references to entitlement in this Note will be limited to disability benefits. Disability benefits are payable for permanent total disability (WASH. REV. CODE § 51.32.060 (1987)), temporary total disability (WASH. REV. CODE § 51.32.090 (1987)), and permanent partial disability (WASH. REV. CODE § 52.32.080 (1987)).

4. WASH. REV. CODE § 51.08.100 (1987). "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

5. WASH. REV. CODE § 51.08.140 (1987). "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

6. See generally 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION app. A, Tables 2-2A (1987) [hereinafter LARSON]. Approximately half of the states have

injury and occupational disease overlap and dovetail, thereby allowing all work-related disabilities to fall into one of the two categories.<sup>7</sup> In Washington, however, the injury and occupational disease statutes have been so narrowly interpreted that until very recently there existed a gap in workers' compensation coverage.<sup>8</sup> Into this gap between compensable injuries and compensable occupational diseases fell two kinds of work-related disabilities that the Department of Labor and Industries<sup>9</sup> would not cover: (1) disability caused by work-related repetitive trauma<sup>10</sup> and (2) disability caused by an occupational disease aggravation of an ordinary disease of life or nonwork-

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comprehensive statutes wherein injuries and occupational diseases are not distinguished as such and are treated jointly under the generic label of "personal injury." The comprehensive approach also has been embraced by Congress in the form of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 902(2) (1982). The remainder of the states vary in their statutory treatment of injuries and occupational diseases, some broadly defining "injury" and separately enumerating occupational diseases, others narrowly defining "injury" as an "unexpected accident" and separately passing "catch-all" statutes wherein all but the most common ailments might be considered to be occupational diseases. The states that exclude coverage for ordinary diseases of life are as follows: ALA. CODE § 25-5-1 (1986); ARIZ. STAT. ANNO. § 23-901 (1983); COLO. STAT. ANNO. § 8-41-108 (1986); CONN. STAT. ANNO. § 31-275 (1986); FLA. STAT. ANNO. § 440.01 (1981); GA. CODE ANN. § 114-801 (1983); IND. STAT. ANNO. § 22-3-7-10 (1986); IOWA CODE ANNO. § 85.2 & 85.61 (1983); KANS. STAT. ANNO. § 44-501 (1986); MASS. GEN. LAWS. ANNO. 152 § 1 (1988 Supp.); MICH. LAWS. ANNO. § 418.161 (1985); MINN. STAT. ANNO. § 176.011 (1988 Supp.); MO. STAT. ANNO. § 287.067 (1988 Supp.); NEB. STAT. § 48.151 (1984); N.C. STAT. § 97.52 (1985); N.D. CODE § 65-01-02 (1987 Supp.); OHIO CODE ANNO. § 4123.01 (1980); OKLA. STAT. ANNO. 85 § 3 (1988 Supp.); OR. STAT. § 656.003 (1987); S.C. CODE ANNO. § 42-11-10 (1988); S.D. CODE. LAWS § 62-8-1 (1978); TEX. STAT. ART. 8306 § 20 (1988 Supp.); UTAH CODE ANNO. § 35-2-1, 12, 27 (1988 Supp.); VT. STAT. ANNO. T.21 § 601 (1978); VA. CODE § 65.1-46 (1987); W. VA. CODE ANNO. § 23-4-1 (1985); WYO. STAT. ANNO. § 27-14-102 (1987). For more information on the workers' compensation schemes in other states, see also Comment, *The Ordinary Disease Exclusion in Virginia's Workers' Compensation Act: Where is it Going After Ashland Oil Co. v. Bean?*, 18 U. RICH. L. REV. 161 (1983). The generic "personal injury" method was adopted by drafters of the Model Act. WORKMEN'S COMPENSATION AND REHABILITATION LAW (Revised) § 2(a) (1977).

7. See *supra* note 6 for different approaches to the same problem of defining compensable work-related disabilities.

8. See *infra* text accompanying notes 49-84.

9. The Department of Labor and Industries is the administrative agency charged with carrying out the provisions of the Industrial Insurance Act. WASH. REV. CODE § 51.04.020 (1987).

10. For the purpose of this Note, repetitive trauma shall be defined as physical traumas (e.g. jolts or bumps) happening over an extended period of time, caused from external sources and that, cumulatively, result in a disabling physical condition. This is the author's definition. It is drawn from the supreme court's ruling in *Dennis v. Department of Labor and Indus.*, 109 Wash. 2d 467, 745 P.2d 1295 (1987). In that case, it was found that a valid workers' compensation claim could be had for a disabling condition proximately caused by 38 years of repetitive tin snipping. See *infra* text accompanying notes 86-161.

related disease.<sup>11</sup>

Recently, in *Dennis v. Department of Labor and Industries*,<sup>12</sup> the Washington Supreme Court had occasion to take a fresh look at Washington's occupational disease statute.<sup>13</sup> After reviewing the legislative history of the Industrial Insurance Act,<sup>14</sup> the past judicial treatment of the occupational disease statute,<sup>15</sup> and the general policy concerns attendant to disability coverage in Washington,<sup>16</sup> the court created a fair and workable test for determining whether a worker's disability is compensable as an occupational disease.<sup>17</sup> In so doing, the *Dennis* court also eliminated the prior judicial standard that kept repetitive traumas and occupational disease aggravations of ordinary diseases from giving rise to compensable claims for workers' compensation benefits.<sup>18</sup> Thus, the court

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11. For the purpose of this Note, the author has defined "aggravation" to mean "to make worse to the extent that treatment is required or disability results." This definition is loosely derived from *McDougle v. Department of Labor and Indus.*, 64 Wash. 2d 640, 393 P.2d 631 (1964); *Bennett v. Department of Labor and Indus.*, 48 Wash. 2d 553, 295 P.2d 310 (1956). See WASH. REV. CODE § 51.32.160 (1987) for the statutory basis. An "ordinary disease of life" is defined by the author as any organic or mental condition whose origin is not work-related with "not work-related" meaning that the preexisting condition was not originally caused by the same employment that aggravated the preexisting condition. This definition is loosely derived from the *Dennis* case. See *Dennis*, 109 Wash. 2d at 471-76, 745 P.2d at 1298-1300. See also LARSON, *supra* note 6, at § 41.33.

12. *Dennis*, 109 Wash. 2d at 467, 745 P.2d at 1295.

13. WASH. REV. CODE § 51.08.140 (1987).

14. WASH. REV. CODE tit. 51 (1987); *Dennis*, 109 Wash. 2d at 469-71, 745 P.2d at 1297-99.

15. WASH. REV. CODE § 51.08.140 (1987); *Dennis*, 109 Wash. 2d at 471-84, 745 P.2d at 1288-1304.

16. *Dennis*, 109 Wash. 2d at 471-84, 785 P.2d at 1288-1304.

17. *Id.* at 481, 745 P.2d at 1303. The court stated that for a worker to establish that he has an occupational disease, he must prove that his disability was proximately caused by his particular employment. Moreover, he must establish that his condition was more probably-than-not caused by distinctive conditions of his employment, as opposed to conditions of everyday life.

18. *Id.* at 472, 745 P.2d at 1298. Prior to the decision in *Dennis*, repetitive traumas resulting in disability had not been allowed as compensable injuries. Because of the repetitive nature, such an etiology can never fit within the narrow time-specific language of the injury statute. *Garrett Freightlines v. Department of Labor and Indus.*, 45 Wash. App. 335, 725 P.2d 463 (1986). But repetitive traumas causing disability had not been recognized as compensable occupational diseases by the Department of Labor and Industries either. DEPARTMENT OF LABOR AND INDUSTRIES WORKERS' COMPENSATION MANUAL: A GUIDE TO CLAIMS ADJUDICATION IN WASHINGTON STATE B-18-19 (1987) (hereinafter MANUAL). Other jurisdictions have, under certain circumstances peculiar to their own workers' compensation systems, provided benefits to workers disabled by repetitive traumas. See, e.g., *Brown Shoe Co. v. Fooks*, 238 Ark. 815, 310 S.W.2d 816 (1958) (compensation given to a worker who developed bursitis due to continued sitting on the job); *Bondar v. Simmons Co.*, 20 N.J.

effectively closed the gap in coverage that had allowed the Department of Labor and Industries to deny benefits to workers whose disabilities, although work-related, could not be stereotyped as injuries or occupational diseases.<sup>19</sup>

This Note focuses on the current state of occupational disease coverage under the workers' compensation system in Washington, and will review the legislative history,<sup>20</sup> the administrative interpretation,<sup>21</sup> and the judicial development of the occupational disease law.<sup>22</sup> Further, after setting forth the broad policy goals behind the Industrial Insurance Act<sup>23</sup> and outlining Washington's occupational disease statute,<sup>24</sup> this Note will conclude with a discussion of the supreme court's analytical framework for a fair, workable, and uniform method for adjudicating occupational disease claims in Washington.<sup>25</sup>

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Super. 147, 89 A.2d 299 (1952) (compensation given to a worker who developed bursitis due to pushing and pulling a lever 500 to 700 times a day); *Kalce v. Dewey Product*, 296 Mich. 540, 296 N.W. 826 (1941) (compensation given to a worker who developed bursitis due to a particular method that the worker used to fill bottles).

19. See *Dennis*, 109 Wash. 2d 467, 745 P.2d 1295 (1987) (where a worker with a disability caused by repetitive trauma was found to have a compensable occupational disease). The problem of distinguishing between injuries and occupational diseases is avoided in those states that have general personal injury statutes. See *supra* note 6 for an enumeration of such states. For an interesting case showing the difficulty that sometimes arises when it is necessary to distinguish between an injury and a disease, see *Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366 (1925). In that case, an embalmer, who had touched a gangrenous corpse, made the mistake of scratching a pimple on the back of his own neck, thereby transmitting the infection to himself. The issue before the court was whether the embalmer sustained an injury or developed an occupational disease.

20. See *infra* text accompanying notes 26-48.

21. See *infra* text accompanying notes 49-84.

22. See *infra* text accompanying notes 85-161.

23. WASH. REV. CODE tit. 51 (1987). For a statement of the goals of the Industrial Insurance Act, see *infra* notes 26-48.

24. WASH. REV. CODE § 51.08.140 (1987). See *infra* notes 26-48 and notes 85-176 and accompanying text.

25. When the current version of the occupational disease statute was passed in 1941, a Washington law student wrote that "[w]ho can say what meaning will be given the key adverbs, 'naturally and proximately,' and when, for that matter, does a disease 'arise out of employment?' Only a series of supreme court decisions can furnish reliable answers." Note, *Workmens' Compensation*, 16 WASH. L. REV. 153, 155 (1941) [hereinafter *Workmens' Compensation*]. Ironically enough, as the author of this Note will point out, it took 46 years to get a reliable answer in the form of the *Dennis* decision. *Dennis*, 100 Wash. 2d 467, 745 P.2d 1295 (1987).

## II. THE LEGISLATIVE DEVELOPMENT OF INDUSTRY AND OCCUPATIONAL DISEASE LAW IN WASHINGTON STATE

Like other states,<sup>26</sup> Washington enacted its first workers' compensation legislation in an effort to ameliorate problems spawned by the burgeoning industrial revolution.<sup>27</sup> Among these problems were the cost to society of the increasing number of common law tort actions brought against employers by injured employees and the uncertainty of the worker's remedy.<sup>28</sup> Given the ever increasing number of work-related injuries occurring as Washington became industrialized, the courts were unable to efficiently provide civil tort remedies for injured workers. Moreover, when judgments were given, the tortfeasor-employers merely attempted to pass on the cost of the judgment to consumers. The point of workers' compensation was not only to quickly and surely compensate injured workers, but to do so as economically as possible. Through industrial insurance, the cost could be spread among the employees and employers, with high-risk industries paying more for coverage than low-risk industries, thereby minimizing the externalization of the cost of work-related injuries. When the Industrial Insurance Act was passed in 1911, occupational

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26. Comment, *What is Wrong with Maine's Occupational Disease Law?*, 34 ME. L. REV. 165 (1982) [hereinafter *Disease Law*] (discussing general development of occupational disease law in the United States).

27. 1911 WASH. LAWS, ch. 74, § 5. See *infra* note 28.

28. The legislature's declaration of the purpose of the workers' compensation act reads as follows:

The common law [tort] system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the State depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided.

1911 WASH. LAWS, ch. 74, § 1.

diseases were not covered;<sup>29</sup> disability compensation was only provided for workers with disabilities caused by "an injury resulting from some fortuitous event as distinguished from the contraction of disease."<sup>30</sup> Under the law at that time, a worker who became disabled after being poisoned by toxic fumes was deemed to have suffered a compensable injury.<sup>31</sup> However, a different worker who was exposed to similar toxic fumes and thus weakened to the extent that he contracted tuberculosis (which resulted in a disability) was held not to have suffered a compensable injury.<sup>32</sup> This definition of "injury" prevailed until 1927, when the legislature passed the prototype of the current injury statute, which defines "injury" as "a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result. . . ."<sup>33</sup>

By the late 1920s it was common knowledge that certain diseases are peculiar to a given occupation and are brought about by exposure to certain harmful conditions that are constantly present, and to which all workmen in the occupation are continually exposed.<sup>34</sup> However, the 1927 amendment to the Industrial Insurance Act failed to extend coverage to occupational diseases.<sup>35</sup> In order to have any hope of recovery, workers disabled by such diseases were forced to bring per-

29. The 1911 Industrial Insurance Act provided:

Each workman who shall be injured whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation . . . and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

1911 WASH. LAWS, ch. 74, § 5.

30. 1911 WASH. LAWS, ch. 74, § 3.

31. *Seattle Can Co. v. Department of Labor and Indus.*, 147 Wash. 303, 265 P. 739 (1928) (court allowed claims of workers poisoned by Benzol fumes, even though the workers did not suddenly fall ill upon first exposure, but only after repeated exposure).

32. *Depre v. Pacific Coast Forge Co.*, 145 Wash. 263, 259 P. 720 (1927) (court disallowed claim because worker who was exposed to sulfuric and muriatic fumes for several months and consequently weakened to the point of being susceptible to the contraction of tuberculosis (which he did contract) had not been the victim of an unexpected or sudden happening).

33. 1927 WASH. LAWS, ch. 310, § 2. The reader should note that the word "injury" stands for both the cause and effect of a work-related disability. See *supra* note 4.

34. *Seattle Can Co.*, 147 Wash. 303, 265 P. 739 (1928). See also *Polson Logging Co. v. Kelly*, 195 Wash. 167, 171, 80 P.2d 412, 414 (1938) (employer not liable for workers' compensation premiums because, under the statute in force at that time, his industry had no diseases peculiar to it).

35. 1927 WASH. LAWS, ch. 310, § 4 (compensation is allowed only to the workman who is injured in the course of his employment).

sonal injury suits against their employers. Consequently, the Washington courts had yet another tort crisis to deal with.<sup>36</sup> At this time, the courts allowed recovery solely to workers whose diseases were "peculiar to their occupations."<sup>37</sup> This requirement prevented the extension of liability to the employers for the everyday ailments and communicable diseases contracted by their workers.<sup>38</sup> Faced with an ever-increasing number of such suits, in 1937 the legislature extended workers' compensation coverage to include occupational disease.<sup>39</sup> This gave employers immunity from actions filed by disabled workers who were pleading common law negligence.<sup>40</sup>

In that first occupational disease statute,<sup>41</sup> the legislature provided for "compensation for disability or death caused by any one of a list of 21 specified diseases if acquired in certain employments specified for each disease."<sup>42</sup> For example, the legislature specified that anthrax was considered an occupational disease (only if contracting it resulted in disability) of handlers of wools, hair, hides, bristles, or skins.<sup>43</sup> That first occupational disease statute did not stand unchanged for long. The realities of the workplace, where a multitude of disability-causing occupational diseases could be contracted under an endless variety of working conditions, soon made it apparent

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36. See *supra* note 28 and accompanying text.

37. Department of Labor and Indus. v. Kinville, 35 Wash. App. 80, 84-85, 664 P.2d 1311, 1313-14 (1983). See *infra* note 92.

38. The "peculiar to the occupation" requirement results in the worker having a higher burden of proof than mere causation. This prevents liability for everyday ailments. See *Dennis*, 109 Wash. 2d at 482-83, 745 P.2d at 1303. Although a worker might not contract a disease "but for" his work, unless the disease is only contracted by workers in the same occupation, the disease would not give rise to a valid claim for benefits. This burden would bar claims for everyday communicable ailments like the flu, as well it should. However, the higher burden established by the "peculiar to the occupation" language is too great since it will also bar other claims that should be allowed. If, for example, dental assistants and thermometer assemblers could both contract mercury poisoning, it could not be said that mercury poisoning is "peculiar to" either occupation. Thus, under the rigid logic of the "peculiar to the occupation" standard, claims for mercury poisoning would not be allowed, even though mercury poisoning is not an everyday disease and is solely related to working conditions.

39. 1937 WASH. LAWS, ch. 212, § 1.

40. The immunity given to employers under the original act in 1911 covered immunity from liability for compensable injuries only. See *supra* notes 28-30. When the act was extended to cover occupational disease, employer immunity was extended to cover immunity from liability for compensable occupational diseases as well. 1937 WASH. LAWS, ch. 212, § 1.

41. See *supra* note 39.

42. *Workmen's Compensation*, *supra* note 25, at 154.

43. See *supra* note 39.

that the list of compensable occupational diseases was inadequate. In response, the legislature followed the lead of other state legislatures<sup>44</sup> and in 1941 exchanged the finite enumerated scheme for a general definition of "occupational disease."<sup>45</sup> When drafting the new statute, the legislature expressly considered and rejected the "peculiar to the occupation" language that had been used by Washington courts prior to the passage of the first occupational disease statute.<sup>46</sup> Instead, the legislature identified occupational disease as "such disease or infection as arises naturally and proximately out of extra-hazardous employment."<sup>47</sup> The definition of "occupational disease" remains essentially the same today.<sup>48</sup>

### III. THE ADMINISTRATIVE INTERPRETATION OF INDUSTRIAL OCCUPATIONAL DISEASE LAW IN WASHINGTON STATE

When processing timely claims for disability benefits, the Department of Labor and Industries first determines whether a particular disability is the result of an injury and if not, then it determines whether the disability is the result of an occupational disease.<sup>49</sup>

#### A. *Injury*

An injury will not be covered unless it can be characterized as evidencing the following five elements (inherent in the injury statute):<sup>50</sup> "(1) an event at a particular point in time, (2) a traumatic event, (3) an event which produces something immediately or within a brief period of time, (4) something occurring from outside the body, and (5) the presence of a physical condition resulting from that event."<sup>51</sup> This matter-of-fact interpretation of the injury statute effectively limits

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44. For an excellent history of the development of workers' compensation law throughout the world, as well as a thorough outline of the evolution of occupational disease coverage in the United States, see *Disease Law*, *supra* note 26. See also Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206 (1952).

45. See *infra* note 47 and accompanying text.

46. *Dennis v. Department of Labor and Indus.*, 44 Wash. App. 423, 429, 722 P.2d 1317, 1320-21 (1986).

47. 1941 WASH. LAWS, ch. 235, § 1. The "extra-hazardous" criterion was later dropped when the legislature extended workers' compensation coverage to most forms of employment in the state. 1959 WASH. LAWS ch. 308, § 4.

48. WASH. REV. CODE § 51.08.140 (1987). For text of statute, see *supra* note 5.

49. MANUAL, *supra* note 18, at B-14.

50. WASH. REV. CODE § 51.08.100 (1987). For text of the statute, see *supra* note 4.

51. MANUAL, *supra* note 18, at B-14.



injury coverage to accidental injuries, such as the situation when the proverbial tree falls on a worker's head.<sup>52</sup> The harshness of this narrow coverage is lessened to the degree that the administrators of the workers' compensation system recognize the common law tort principle that "an employer takes an employee as he finds him."<sup>53</sup> Thus, if a work-related injury aggravates or "lights up" a preexisting condition, the disabled worker still will be entitled to full benefits.<sup>54</sup> In an injury aggravation case, it makes no difference whether the underlying condition is or is not work-related.<sup>55</sup>

### B. Occupational Disease

If a disability is not an injury or the result of one, the Department of Labor and Industries will determine whether the disability can be categorized as an occupational disease or

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52. Also included in this category are claims for a disability that immediately manifests itself after a worker receives a finite series of traumas, such as jolts and jars, provided that the traumas occurred over a short, well-defined period of time. *Lehtinen v. Weyerhaeuser Co.*, 63 Wash. 2d 456, 458-59, 387 P.2d 760, 762 (1963).

53. MANUAL, *supra* note 18, at B-15. See also W. PROSSER & M. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 43 at 291-92 (5th ed. 1984). At common law, a tortfeasor took a victim as he found him. Thus, if the tortfeasor killed a soft-headed man with a blow to the head that would have merely stunned the average man, the tortfeasor was still liable for the death of the thin-skulled victim. See also *Wendt v. Department of Labor and Indus.*, 18 Wash. App. 674, 571 P.2d 229 (1977).

54. The term "lights up" means to render a latent condition symptomatic. *Harbor Plywood Corp. v. Department of Labor and Indus.*, 48 Wash. 2d 553, 556-57, 295 P.2d 310, 313 (1956). See generally *Bennett v. Department of Labor and Indus.*, 95 Wash. 2d 531, 627 P.2d 104 (1981) (back injury aggravated latent and preexisting spinal condition); *McDougle v. Department of Labor and Indus.*, 64 Wash. 2d 640, 393 P.2d 631 (1964) (back injury aggravated latent and preexisting osteoarthritic condition); *Miller v. Department of Labor and Indus.*, 200 Wash. 674, 94 P.2d 764 (1939) (back injury aggravated latent and preexisting congenital defect).

55. *Harbor Plywood Corp. v. Department of Labor and Indus.*, 48 Wash. 2d 553, 295 P.2d 310 (1956). As long as there is no disability prior to the injury, the worker will receive benefits for the full extent of the disability he had subsequent to the injury. If there is disability prior to the injury, then any permanent disability award (as opposed to time loss benefits) will be reduced pro rata according to the percentage of the post-injury disability that is attributable to the pre-injury disability. *Bennett*, at 534, 627 P.2d at 106. To illustrate, consider the following hypothetical: A, B, and C are loggers. A is in perfect physical condition. B and C have bad backs. B has had back surgery for work-related injuries, and though his back is weaker than A's, B's condition is stable and not disabling and he is receiving no medical treatment. C is predisposed to osteoarthritis and has a degenerative spinal condition which is not work-related and that condition is not disabling. A, B, and C are each struck by a falling tree and receive blows to the back. Consequently, each is disabled. The blows received by B and C would not have disabled A. Under Washington's workers' compensation system, A, B, and C would receive full permanent disability awards.

as the result of one.<sup>56</sup> In contrast to the standard injury inquiry, the Department of Labor and Industries (prior to the supreme court's decision in *Dennis*) went outside the language of the occupational disease statute when adjudicating an occupational disease claim.<sup>57</sup> In order for a disabled worker to be compensated, the etiology of the worker's disabling condition must have been such as to have satisfied two requisite tests of the Department of Labor and Industries.<sup>58</sup> The first test required that an occupational disease be proximately caused by objective circumstances present in the workplace that were measurable and observable.<sup>59</sup> The other test required that an occupational disease be connected with a particular occupation; if the disability was common to workers in that particular occupation but not in others, the disability was considered an occupational disease.<sup>60</sup> This latter test is but a milder version

56. MANUAL, *supra* note 18, at B-14.

57. The Department of Labor and Industries used the *Kinville* test. Department of Labor and Indus. v. *Kinville*, 35 Wash. App. 80, 664 P.2d 1311 (1983). See *infra* notes 85-161 and accompanying text.

58. MANUAL, *supra* note 18, at B-16-17.

59. *Id.* at B-17. This would obviously disqualify stress-induced disability, as the factors causing stress would not be measurable and observable. However, most stress cases involve heart attacks and heart cases are analyzed differently than regular injury or occupational disease cases. For a good explanation of this analysis as it is currently used when adjudicating heart claims, see *Louderback v. Department of Labor and Indus.*, 14 Wash. App. 931, 547 P.2d 889 (1976). See also *infra* note 102. For the purpose of this Note, the analysis used in the heart cases will not be discussed further.

60. MANUAL, *supra* note 18, at B-17. The focal point for the tests seems to be the likelihood that a worker in a certain industry will contract a certain disease. Thus, if it could be expected that a certain percentage of workers would contract a certain disease, the disabled worker contracting that disease while working in the industry associated with that disease would receive benefits. For an example of a situation not meeting this test because of the "peculiar to the occupation" standard, see Letter from Nancy Hopper, Department of Labor & Indust. Claims Adjudicator (August 20, 1987) (rejecting a worker's claim for benefits). In this real-life case, the worker developed a disabling foot condition as a result of standing stationary for hours each day on a cement floor at a checkout counter. The worker's name has been deleted to protect the worker's identity:

Dear Injured Worker:

. . . It is the Department's determination after consideration of all available information that your condition does not qualify as an industrial injury nor does it meet the criteria to be accepted as an occupational disease.

To be considered allowable as an industrial injury, you must be able to document a traumatic incident at a specific time and place in the course of employment. As your condition developed over a period of time, it does not meet this criteria.

To be considered as an occupational disease, your condition must meet a number of criterion: your condition must "arise naturally and proximately out of employment;" your work duties do not demonstrate that your condition

of the "peculiar to the occupation" standard that was rejected by the legislature when it passed the current occupational disease statute.<sup>61</sup>

There are several reasons why identifying an occupational disease is more difficult than identifying an injury. The initial identification problem lies in the elusive concept of disease itself. Despite the fact that an occupational disease might best be described as anything other than an injury that causes a work-related disability, many people link the concept of disease with contagion.<sup>62</sup> This false assumption can lead to workers with work-related disabilities being denied workers' compensation benefits merely because a claims administrator misunderstands a complicated etiology.<sup>63</sup>

Further compounding the problem of identifying a compensable occupational disease is the legislature's confusing tripartite application of the word "disease" in Washington's workers' compensation law. First, an occupational disease is

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would not have developed if you had not been employed as a grocery checker. . . .

Finally, it has not been demonstrated that workers in your profession are more likely than the general public to develop neuritis of the foot and/or tarsal tunnel syndrome. Your condition is not a hazard which is specific to your occupation.

I regret that we are unable to offer a more favorable response to your request for reconsideration. An Order will be issued and mailed separately which affirms the rejection of your claim. . . .

61. The standard is almost the same, for the worker must prove that his disease is inherent in his occupation, but not in others. In the "peculiar to the occupation" context, the worker must show that workers in other occupations do not get his disease. The former requires a showing of greater likelihood of contraction in a particular employment; the latter requires a showing of no likelihood of contraction in other employment.

62. See generally Comment, *Workmen's Compensation and Occupational Disease*, 43 MONT. L. REV. 75, 92-100 (1982) (preconceived notions of disease based on five false assumptions).

63. *Id.* at 93. Among the false assumptions concerning disease are the following: (1) that a disease is caused by repeated or gradual exposure; (2) that a disease is manifested over a period of time; (3) that a disease is caused by a chemical, bacterial, or viral agent, as opposed to a physical agent such as a heavy weight or a sharp object; (4) that a disease is expected, but an injury is unexpected; and (5) that proof of work-relatedness is different for a disease than it is for an injury. The problems with these assumptions should be apparent. First, a one-time exposure to a highly toxic substance can sometimes cause disability at a much later date. Second, after gradual and repeated exposure to a toxic substance, one might suddenly have an allergic reaction. Third, long-term exposure to friction or vibration can cause disability. Fourth, as science and technology advance, it can be assumed that people will be exposed to new substances that will cause unexpected diseases, just as with increased medical knowledge it likely will be discovered that exposures that were once thought to be safe have caused diseases that were once thought to be unrelated to exposures.

the interaction between the worker's body and the work conditions that causes disability.<sup>64</sup> Second, the resulting disabling condition is also known as an occupational disease.<sup>65</sup> Third, in an aggravation case, the underlying condition also might be an occupational disease.<sup>66</sup> Hence, in a common occupational disease claim, a Department of Labor and Industries claims administrator might be confronted with a worker whose occupational disease was aggravated by an occupational disease, which would result in another occupational disease.<sup>67</sup> Because of the prevailing false assumptions about disease and the ambiguity of the occupational disease statute, occupational disease claims seem much harder to establish than injury claims.<sup>68</sup>

In most states, a work-related disability is considered an injury or an occupational disease; in those states, the definitions of "injury" and "occupational disease" overlap enough so that no work-related disability falls between the two definitions.<sup>69</sup> Thus, the focus in those states is on whether the disability is work-related—if it is, then the disability is a compensable disability. Until very recently, in Washington, there was a gap between the definitions of "injury" and "occupational disease." Disabilities caused by repetitive trauma and occupational disease aggravations of nonoccupational diseases or conditions fell into this gap and consequently were not

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64. WASH. REV. CODE § 51.32.180 (1987): "Every worker who suffers disability from an occupational disease in the course of employment . . . ."

65. WASH. REV. CODE § 51.08.140 (1987). For text of the statute, see *supra* note 5.

66. *Id.* Such a condition would be an occupational disease if it was the residual of an old occupational disease, whether the residual condition is disabling or not. For example, a worker might have asbestosis, an occupational disease, then be exposed to isocyanate fumes causing further respiratory damage constituting an occupational disease.

67. See *supra* note 66. In the hypothetical given in the preceding note, the asbestosis would constitute a preexisting occupational disease. The inhalation of isocyanates over an indefinite period of time would be an occupational disease. Finally, the resulting condition would be an occupational disease.

68. In 1985, out of a total of 192,503 workers' compensation claims that were accepted by the Department of Labor and Industries, only 8,750 were occupational disease claims. Department of Labor and Indus., WASHINGTON STATE WORK INJURY AND ILLNESS SUMMARY 3, 6 (1985). Admittedly, it is not known by this author whether this statistic shows that there were far fewer occupational disease claims made, or simply that there were fewer allowed. The three most frequently reported occupational diseases were (1) inflammation of the joints, 2,077 cases; (2) systemic poisoning, 1,449 cases; and (3) dermatitis, 1,139 cases. *Id.* at 6.

69. See *supra* note 5 and accompanying text. For a brief exegesis of the various burdens of proof and the difficulty of evidence-gathering that a worker faces in an occupational disease case, see Note, *Dual Causation of Occupational Disease: Rutledge v. Tultex Corp.*, 19 WAKE FOREST L. REV. 1137, 1143 (1983).

compensable.<sup>70</sup>

### 1. Repetitive Trauma

Repetitive trauma, trauma that occurs over an indefinite or extended period of time, did not fit within the injury statute,<sup>71</sup> nor, prior to *Dennis*, was it considered an occupational disease.<sup>72</sup> Because repetitive trauma, by definition, takes place over an extended period of time, it did not meet the finite time frame required by the injury statute.<sup>73</sup> Thus, courts held that repetitive trauma was not the type of accidental trauma that the legislature had in mind when it drafted the injury statute. This follows because repetitive trauma over an indefinite period of time can neither be "sudden" nor bring about a "prompt result" as required by statute.<sup>74</sup> Until *Dennis*, repetitive trauma did not give rise to a compensable occupational disease claim.<sup>75</sup>

Repetitive trauma almost invariably encompasses a wear and tear phenomenon acting on some bodily part. Wear and tear is most commonly caused by physical movement, which is present to a certain degree in everyday life. Movement is not "peculiar" to any particular occupation; thus, only in rare instances could the etiology of a repetitive trauma-induced condition meet the "peculiar to the occupation" test used by the Washington courts.<sup>76</sup> Moreover, the conditions caused by wear and tear, for example, abrasions, joint problems, respiratory ailments, etc., are not peculiar to any particular occupation, so coverage for them as occupational diseases also would not be forthcoming because of their failure to meet the "peculiar to the occupation" test used by the Department of Labor and

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70. *Snyder v. Department of Labor and Indus.*, 40 Wash. App. 566, 699 P.2d 256 (1985). Only recently was coverage allowed for occupational disease aggravations of preexisting occupational disease conditions. However, aggravations of non-occupational disease conditions were still not considered compensable.

71. *Garrett Freightlines*, 45 Wash. App. at 343-45, 725 P.2d at 468-69.

72. *Dennis*, 109 Wash. 2d at 483, 745 P.2d at 1304.

73. *Garrett Freightlines*, 45 Wash. App. at 343-45, 725 P.2d at 468-69. See also WASH. REV. CODE § 51.08.100 (1987). For a digest of cases wherein other jurisdictions issued conflicting rules as to coverage of repetitive trauma-based disabilities, see LARSON, *supra* note 6, at §§ 39.10-39.60. For a digest of cases wherein other jurisdictions issued conflicting rules as to coverage of occupational disease aggravations of preexisting conditions, see LARSON, *supra* note 6, at § 41.63.

74. WASH. REV. CODE § 51.08.100 (1987). For the text of the statute, see *supra* note 4.

75. *Dennis*, 109 Wash. 2d at 483, 745 P.2d at 1304.

76. See *infra* text accompanying notes 85-161.

Industries and the Washington courts.<sup>77</sup> Finally, as described below, the Department of Labor and Industries did not use its standard occupational disease analysis when scrutinizing repetitive trauma-based claims.

Although recognizing that repetitive trauma falls "into a grey area between 'trauma' [meaning 'injury'] and 'occupational disease,'" the Department of Labor and Industries used neither injury nor occupational disease analysis when adjudicating repetitive trauma-based claims.<sup>78</sup> For repetitive trauma claims, the Department of Labor and Industries developed independent criteria, which required that a worker's disability be the result of unusually strenuous repetitive movements made by that worker that were not part of the routine of that worker.<sup>79</sup> These criteria adopted by the Department of Labor and Industries were without statutory or common law foundation. Apparently, the Department of Labor and Industries was using these criteria in order to avoid paying benefits to victims of everyday wear and tear.<sup>80</sup>

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77. This situation is best explained using a hypothetical. Sally is a disabled worker. For several years she worked as a heavy equipment operator. Sally's job required her to pull a lever with her right arm several hundred times each working day. Sally now has a severe bursitis condition that impairs the use of her right shoulder and elbow. Her doctor has told her that her condition is the direct result of pulling that lever for so many years. Until *Dennis*, the policy of the Department of Labor and Industries was to reject claims like Sally's.

This policy was curious because this type of trauma was expressly recognized as an occupational disease in the 1937 statute that enumerated occupational diseases. 1937 WASH. LAWS, ch. 212, § 1. The reader must bear in mind that most claims for workers' compensation benefits, be they accepted or rejected, begin and end at the level of the Department of Labor and Industries. The Department of Labor and Industries looks to court rulings for guidance in its own adjudication of claims. These court rulings that—for whatever problems of proof or policy—bar benefits from those suffering from repetitive trauma-based disabilities or occupational disease aggravations of preexisting nonoccupational conditions can have tremendous repercussions for the silent majority that is willing to take the Department of Labor and Industries' "no" for an answer.

78. MANUAL, *supra* note 18, at B-18-19.

79. *Id.*

80. In Sally's case, since she pulled the lever every day, her doing so would be considered a routine part of her job, no matter how strenuous pulling the lever was. Because pulling the lever was not "unusual," Sally would not be eligible for disability benefits. This would be true even though she would not have become disabled had she not pulled the lever and even though, under one of the occupational disease tests, the pulling of the lever is an objective circumstance that is measurable and observable. See *supra* text accompanying note 59. Under the second test, Sally's disability would not give rise to a valid claim because bursitis is not peculiar to heavy equipment operators. See *supra* text accompanying note 60.

## 2. Occupational Disease Aggravations of Preexisting, Nonoccupational Diseases or Conditions

Occupational disease aggravations of preexisting, nonoccupational diseases or conditions also were not covered under the workers' compensation system prior to the *Dennis* ruling. The probable reason for this is that the Department of Labor and Industries followed the "peculiar to the occupation" standard and denied coverage of ordinary diseases of life. Thus, according to the Department of Labor and Industries' logic, if the occupational disease must be inherent in the occupation, it follows that the preexisting condition being aggravated should also be inherent to some occupation, and not be an ordinary disease of life. The Department's position was not consistent with the fact that injury aggravations of preexisting, nonoccupational diseases or conditions were covered.<sup>81</sup> For example, a worker who suffers a blow to the back (an injury) that aggravates a previously quiescent, congenital spinal deformity will receive benefits if the blow results in disability.<sup>82</sup> Likewise, a worker who inhales irritants over several years (an occupational disease) and consequently aggravates a previously quiescent condition of work-related emphysema (an occupational disease) will be compensated if disability ensues.<sup>83</sup> However, theoretically, until *Dennis*, a worker who inhaled irritants over several years (an occupational disease) and consequently aggravated a previously latent congenital respiratory condition, thereby becoming disabled, was denied benefits.<sup>84</sup>

## IV. THE JUDICIAL DEVELOPMENT OF OCCUPATIONAL DISEASE LAW IN WASHINGTON STATE<sup>85</sup>

The Washington courts have had little to say about the state's injury statute. The courts considered the statute "crabbed and probably inconsistent with the professed goal" of the workers' compensation act, yet "nonetheless clear and relatively unambiguous."<sup>86</sup>

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81. *Dennis*, 109 Wash. 2d at 475-76, 745 P.2d at 1300.

82. See *supra* note 54.

83. *Snyder*, 40 Wash. App. at 575, 699 P.2d at 259.

84. *Dennis*, 109 Wash. 2d at 483, 745 P.2d at 1300.

85. This Note considers decisions only in Division I and Division II of the Washington State Court of Appeals. There were no decisions in Division III that addressed the issues relevant to this article.

86. *Garrett Freightlines*, 45 Wash. App. at 345, 725 P.2d at 469.

Until *Dennis*,<sup>87</sup> the courts had even less to say about Washington's occupational disease statute.<sup>88</sup> The highest state court to address the occupational disease statute in any detail had been the Washington Court of Appeals, Division II.<sup>89</sup> In Division II, the court imposed a strict standard akin to the old "peculiar to the occupation" language.<sup>90</sup> The Division II standard was the only clear authority for the Department of Labor and Industries to follow when processing claims for occupational disease-based disabilities.

In fashioning its standard, the Division II court inexplicably relied on Washington Supreme Court decisions that predated the current occupational disease statute.<sup>91</sup> When deciding the case of *Department of Labor and Industries v. Kinville*, the court of appeals stated that the statutory language requiring that a disease arise "naturally and proximately" out of employment meant that only those diseases that are inherent in a disabled worker's particular occupation would be compensable.<sup>92</sup> The court further ruled that a "worker has the burden of establishing that the conditions producing his disease are peculiar to, or inherent in, his particular occupation."<sup>93</sup> Moreover, the court asserted that to meet this burden, the worker must show that "the job requirements of his particular occupation exposed him to a greater risk of contracting the disease than would other types of employment or nonemployment life."<sup>94</sup>

Clearly, the *Kinville* court espoused two very different standards: the first standard required that to be compensable, an occupational disease must be associated with a particular occupation, and the second standard allowed a claim only if the conditions that caused the disease were unique to a given occupation. One standard focused on the disease, the other on the conditions causing the disease. Under the former standard, a worker had to show that his disease was readily identifiable with his line of work. This burden constrained claimants as much as the old enumerated statute did, for, while many dis-

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87. *Dennis*, 44 Wash. App. at 435, 722 P.2d at 1324.

88. WASH. REV. CODE § 51.08.140 (1987).

89. *Kinville*, 35 Wash. App. at 84-85, 664 P.2d at 1313-14.

90. *Id.*

91. *Id.* (citing *Seattle Can Co. v. Department of Labor and Indus.*, 147 Wash. 303, 265 P.2d 739 (1928)).

92. *Kinville*, 35 Wash. App. at 87, 664 P.2d at 1314-15.

93. *Id.* at 87-88, 664 P.2d at 1314-15.

94. *Id.* at 88, 664 P.2d at 1315.



eases can presumably be contracted through employment, only unusual diseases such as black lung and asbestosis are readily identified with specific occupations.<sup>95</sup> Under the latter standard, a worker had to show that his occupation required him to encounter hazards not commonly present in other occupations. Given the complexity of today's workplace, as well as the myriad of substances and conditions that workers are exposed to, this also was too great a burden.

Not only did the *Kinville* court generate faulty analysis, but it also misconstrued legislative history and misinterpreted supreme court authority. In resurrecting the "peculiar to the occupation" standard, the court admitted that it lifted the standard from a line of cases decided, not on the basis of the "naturally and proximately" terminology of the current statute,<sup>96</sup> but upon judicial constructions predating the statute.<sup>97</sup> In doing so, the court ignored the legislature's decision not to use the "peculiar to the occupation" standard in defining "occupational disease."<sup>98</sup> Besides ignoring legislative history, the *Kinville* court disregarded higher case authority that should have, through *stare decisis*, preempted the lower court's holding. In *Simpson v. Department of Labor and Industries*,<sup>99</sup> the supreme court stated that the legislature knew what it was

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95. See *supra* notes 42-43 and accompanying text. Under the original occupational disease statute, only certain diseases were covered in a given occupation. 1937 WASH. LAWS, ch. 212, § 1.

96. WASH. REV. CODE § 51.08.140 (1987).

97. The *Kinville* court stated:

In evaluating this issue we have looked to prior Washington decisions which have addressed the question of whether a particular disease satisfies the statutory requirements presently contained in [WASH. REV. CODE] § 51.08.140 . . . . Several early decisions held that in order to satisfy the statutory requirements a disease had to be peculiar to a given occupation. . . . Importantly, the 'peculiar to the occupation' requirement espoused in these decisions was not based on a judicial construction of the 'naturally and proximately' terminology contained in the then existing occupational disease statute. Instead, it was based exclusively on a line of cases decided before enactment of the original occupational disease act in this state.

*Kinville*, 35 Wash. App. at 84-85, 664 P.2d at 1313 (citing *Seattle Can Co. v. Department of Labor and Indus.*, 147 Wash. 303, 265 P.2d 739 (1928); *St. Paul and Tacoma Lumber Co. v. Department of Labor and Indus.*, 19 Wash. 2d 639, 144 P.2d 250 (1943)).

98. *Dennis*, 44 Wash. App. at 431, 722 P.2d at 1322.

99. 32 Wash. 2d 472, 202 P.2d 448 (1949). The *Simpson* court opined that the "peculiar to the occupation" concept was of no relevance to the current occupational disease statute, as that language had been intentionally omitted from the statute. *Id.* at 466-78, 202 P.2d at 451. Additionally, the *Simpson* court stated that the proximate cause language was the key to the statute, as the legislature had to be presumed to be familiar with that term since it used it so prominently in the statute. *Id.* at 479, 202 P.2d at 452.

doing when it put the words "naturally and proximately" in the occupational disease statute, and that the legislature, when speaking in terms of proximate cause, left no room for the courts to continue to apply the "peculiar to the occupation" standard. The supreme court regarded the appropriate inquiry to be one focusing on work-relatedness, not on the type of disease:

Under the present act, no disease can be held not to be an occupational disease as a matter of law, where it has been proved that the *conditions* of the extrahazardous employment in which the claimant was employed naturally and proximately produced the disease, and that but for the exposure to such conditions the disease would not have been contracted.<sup>100</sup>

Despite the clarity of the *Simpson* decision, the *Kinville* court managed to avoid the high court's rejection of the "peculiar to the occupation" standard by postulating that *Simpson* was overruled, *sub silentio*,<sup>101</sup> by a later supreme court case.<sup>102</sup> Only in this way could the Division II court relegate the paramount factor of causation to a position inferior to that of the common law "peculiar to the occupation" standard that had never been part of Washington's Industrial Insurance Act. The Division II court's analysis was eventually challenged by the Division I court in *Dennis v. Department of Labor and*

100. *Id.* at 479, 202 P.2d at 452.

101. *Kinville*, 35 Wash. App. at 86, 664 P.2d at 1314.

102. *Favor v. Department of Labor and Indus.*, 53 Wash. 2d 698, 336 P.2d 382 (1959). In *Favor*, the claimant had suffered a coronary occlusion as a result of allegedly worrying too much about his job. As *Favor* is a heart case and heart cases involve different standards, the *Kinville* court should not have relied on *Favor*. See *Windust v. Department of Labor and Indus.*, 52 Wash. 2d 33, 323 P.2d 241 (1958). See also MANUAL, *supra* note 18, at B-23-27. See also *supra* note 59. Holding that the claimant's condition did not arise "naturally and proximately" out of his employment, the *Favor* court opined that "[p]ersons in all employments, and in all activities are exposed to the emotional stress and strain of anxiety and worry, and it [the claimant's occlusion] cannot be said to have arisen naturally and proximately from the claimant's employment." *Favor*, 53 Wash. 2d at 706, 336 P.2d at 386-87. On its face, the high court's ruling in *Favor* is that the claimant failed to prove causation. The extrapolation by the *Kinville* court from the *Favor* dicta to a "peculiar to the occupation" standard seems strained, even after considering that *Favor* is a heart case. Arguably, what the *Favor* court was saying was that people get heart attacks all the time, and there needs to be more evidence of work-relatedness before a claim such as this one will be allowed. That interpretation is much more reasonable than one attributing to the *Favor* court the notion that a heart attack will give rise to a claim if heart attacks are peculiar to a certain occupation and the worker that had the attack worked at that occupation.

*Industries.*<sup>103</sup>*A. The Facts of the Dennis Case*<sup>104</sup>

Kenneth Dennis was a 56-year-old man whose job required him to use heavy tin snips to cut sheet metal. After 38 years of using the tin snips for four to five hours per day, Mr. Dennis developed a disabling wrist condition. This condition was the result of a latent and preexisting osteoarthritic condition that was aggravated or "lighted up" by his repetitive use of the tin snips.<sup>105</sup> Mr. Dennis' claim for disability benefits was rejected by the Department of Labor and Industries on the grounds that (1) he had not suffered an injury and (2) his condition was not an occupational disease as defined under the statute. Mr. Dennis' claim presented the questions of whether repetitive trauma was a compensable occupational disease and whether an occupational disease aggravation of a latent, nonoccupational condition was compensable under the occupational disease statute.

Mr. Dennis appealed the Department of Labor and Industries' rejection of his claim.<sup>106</sup> At a hearing held before an industrial appeals judge, Mr. Dennis' attending physician testified that Mr. Dennis' disability was caused by his work.<sup>107</sup> The doctor admitted that Mr. Dennis had osteoarthritis in various parts of his body, but concluded that since only the osteoarthri-

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103. *Dennis*, 44 Wash. App. at 431, 722 P.2d at 1322.

104. *Id.* at 424-26, 722 P.2d at 1318-19. All of the facts that follow in this section are taken from the opinion of the court of appeals.

105. "Osteoarthritis" is defined as "noninflammatory degenerative joint disease." W. DORLAND, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1068 (26th ed. 1985).

106. Such appeals are taken pursuant to WASH. REV. CODE § 51.52.060 (1987). Because repetitive traumas and occupational disease aggravation of preexisting nonoccupational conditions were two disabilities that the Department of Labor and Industries had (up until now) refused to recognize, the fact that Mr. Dennis' claim involved both of these disabilities made his the ideal case for supreme court review.

107. An appeal from a "final" order of the Department of Labor and Industries may be taken to the Board of Industrial Insurance Appeals by an aggrieved party within 60 days of the issuance of the order. *Id.* § 51.52.060. The appeal, if granted, is then heard at an administrative appeals hearing. An industrial appeals judge is an administrative judge who presides at appeals hearings. A proposed decision and order is drafted by the industrial appeals judge at the close of the hearing. Any party wishing to dispute the proposed decision and order has 20 days following issuance of the order to file a petition for review before the joint, three-person Board of Industrial Insurance Appeals. *Id.* § 51.52.104. If the petition is denied or if the joint Board of Industrial Insurance Appeals reviews the case and issues a final determinative order, a dissatisfied party may file an appeal within 30 days with the superior court for a trial de novo. *Id.* § 51.52.110. Following a trial before the superior court, further appeals may be taken before higher courts as in any civil matter. *Id.* § 51.52.140.

tis in Mr. Dennis' wrists was symptomatic, the nature of Mr. Dennis' work had caused the disability by aggravating the previously nonsymptomatic osteoarthritis. At the hearing, Mr. Dennis based his appeal on the physician's testimony. He did not attempt to meet the *Kinville* burden of proving that the work requirement producing his disease, i.e., the use of the tin snips, was peculiar to or inherent in his particular occupation and that this work required him to be exposed to a greater risk of contracting osteoarthritis than would other types of employment or unemployment life.<sup>108</sup> After the hearing, the industrial appeals judge issued a proposed decision and order holding that because Mr. Dennis' preexisting osteoarthritis was aggravated by his work-related use of the tin snips, he was entitled to disability benefits.

Upon reviewing the industrial appeals judge's order, the Board of Industrial Insurance Appeals reversed and ruled that Mr. Dennis was not entitled to workers' compensation benefits.<sup>109</sup> Though the Board of Industrial Insurance Appeals agreed that Mr. Dennis' use of the tin snips aggravated his preexisting osteoarthritis, it held that since the preexisting osteoarthritic condition was unrelated to Mr. Dennis' employment, any work-related aggravation of the condition was not compensable as an occupational disease. Thus, the Board of Industrial Insurance Appeals followed the Department of Labor and Industries' policy of not allowing occupational disease aggravations of even latent nonoccupational conditions.<sup>110</sup> Mr. Dennis appealed the ruling to the superior court, which granted the Department of Labor and Industries' motion for summary judgment.<sup>111</sup> Mr. Dennis then appealed to the Court of Appeals, Division I.

### *B. Ruling of the Court of Appeals, Division I*

After concluding its review of the previous proceedings, the court of appeals reversed the superior court's granting of

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108. The attempt to meet the burden would have been a futile effort given that osteoarthritis is a common condition not limited to the tin snipping trade.

109. *Dennis*, 109 Wash. 2d at 469, 745 P.2d at 1296-97. See *supra* note 107 (explaining the Board of Industrial Insurance appeals process). The Board of Industrial Insurance Appeals is an independent state agency that was created, in part, to review disputes between injured workers, their employers, and the Department of Labor and Industries. See WASH. REV. CODE §§ 51.52.010-020 (1987).

110. See *supra* text accompanying notes 81-84.

111. See *supra* note 107. Such appeals to the superior court level are taken pursuant to WASH. REV. CODE § 51.52.110 (1987).

the Department of Labor and Industries' motion for summary judgment, remanding the case to the superior court for a jury trial *de novo*.<sup>112</sup> The court based its reversal on three grounds. First, contrary to the ruling below, the court stated that repetitive trauma could be considered an occupational disease.<sup>113</sup> Second, despite the then-current policy of the Department of Labor and Industries, the court concluded that a work-related aggravation of a latent nonoccupational condition resulting in disability was compensable.<sup>114</sup> Third, contrary to the *Kinville* court, the court of appeals held that a worker does not have to show that the conditions producing the worker's disability were peculiar to the worker's particular occupation, but only that the conditions naturally and proximately caused the disability.<sup>115</sup>

### C. *The Analysis of the Court of Appeals, Division I*

By duly considering the legislative history of the Industrial Insurance Act,<sup>116</sup> the past judicial treatment of the occupational disease statute,<sup>117</sup> and the general policy concerns behind Washington's workers' compensation system,<sup>118</sup> the intermediate appellate court was able to review a complex case without repeating the errors of the Department of Labor and Industries and the *Kinville* court. Focusing upon the Industrial Insurance Act's underlying purpose of compensating workers with work-related disabilities, whether such disabilities are the result of injury or disease, the court concluded that the law requires that "a worker should be compensated if the worker's occupational activities caused disability . . ."<sup>119</sup> Noting that the "[l]egislature expressly rejected the 'peculiar to [the occupation]' language in 1941 when framing the current occupational disease definition," the court disavowed the *Kinville* court's use of that standard.<sup>120</sup> The appellate court claimed that the use of that standard caused the *Kinville* court to erroneously focus on the relationship between the worker's

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112. WASH. REV. CODE § 51.52.115 (1987) (jury trial *de novo* standard of review).

113. *Dennis*, 44 Wash. App. at 428, 722 P.2d at 1320.

114. *Id.* at 435-36, 722 P.2d at 1324.

115. *Id.*

116. WASH. REV. CODE tit. 51 (1987).

117. WASH. REV. CODE § 51.08.140 (1987).

118. See *supra* note 28 and accompanying text.

119. *Dennis*, 44 Wash. App. at 426-27, 722 P.2d at 1319.

120. *Id.* at 431, 722 P.2d at 1322.

occupation and the conditions causing the worker's disability.<sup>121</sup> The Division I court stated that the proper focus for the inquiry was on the disability and its relation to the worker's work-related activities.<sup>122</sup> To make this inquiry, the court ruled that the occupational disease statute must be literally observed. According to the court, a workers' compensation claimant bears the burden of proving (on a more probable than not basis) "whether the disease-based disability was caused by the work or its conditions to meet the 'proximate' requirement, and the logical relationship of the disability to the work or its conditions to meet the 'naturally' requirement."<sup>123</sup>

By hinging its analysis on the causation issue, the Division I court discarded all of the tests that the Department of Labor and Industries and the *Kinville* court had created in order to scrutinize the mechanics of a worker contracting an occupational disease.<sup>124</sup> As far as the Division I court was concerned, when the only issue is whether a work-related activity caused disability, whether that disability was caused by a repetitive trauma, gradual exposure, or aggravation of a preexisting condition is irrelevant.<sup>125</sup> Moreover, the court's focus made the issue of whether a preexisting condition was work-related moot in occupational disease aggravation cases. This has always been true in cases involving injury aggravations.<sup>126</sup>

Although its test for adjudicating an occupational disease claim rendered the issues of repetitive trauma and aggravations of nonoccupational conditions irrelevant, the Division I court nevertheless addressed both of those topics in-depth, showing where other courts had gone wrong in upholding the Department of Labor and Industries' policy on those issues.<sup>127</sup> With respect to repetitive trauma, the court cited the first

121. *Id.*

122. *Id.*

123. *Id.*

124. See *supra* text accompanying notes 49-84. See also *supra* notes 92-94 and accompanying text.

125. For that matter, even the distinction between injury and occupational disease is irrelevant. However, because the statutory structure requires that injury and occupational disease be segregated, the time element can serve to define the difference between the two statutory constructs. Yet, even the time element distinction does not bear on the issue of causation.

126. As long as the injury is the proximate cause of disability, any nondisabling preexisting condition is irrelevant when determining disability awards. *Fochtman v. Department of Labor and Indus.*, 7 Wash. App. 286, 291, 499 P.2d 255, 259 (1972). See *supra* note 55 (for segregation of preexisting disability rule).

127. *Dennis*, 44 Wash. App. at 430-35, 722 P.2d at 1321-24.

occupational disease statute, conclusively showing that the legislature had allowed claims for disabling blisters, abrasions, and bursitis-like conditions brought about by the processes of continuous friction, rubbing, pressure, and vibration.<sup>128</sup> Since the legislature had abandoned the painfully narrow enumerated statute for a general definition of occupational disease, the court reasoned that at the very least, occupational diseases enumerated under the old statute would be considered occupational diseases under the new statute.<sup>129</sup> The court concluded that judicial denial of claims for disability caused by repetitive trauma—that would have been covered under the old statute—was unsupportable.<sup>130</sup> On this point, the court firmly stated that there is “not the sort of gap in coverage between discrete injuries and occupational diseases as the Department [of Labor and Industries] now argues exists in the current statutory structure.”<sup>131</sup>

The court further pointed out the inconsistency in the Department of Labor and Industries' disparate treatment of injury aggravations and occupational disease aggravations, attributing this treatment to the fact that both the Department of Labor and Industries and the courts wrongly focus on the nature of the preexisting condition rather than appropriately focusing on the cause of the disability.<sup>132</sup> Citing with approval a line of New York cases allowing claims for aggravations,<sup>133</sup> the court quoted from one New York decision wherein it was held:

The ultimate test is not the initiation or precipitation of the disease itself, but whether the employment acts upon that disease or condition in such a manner as to cause a disability which did not previously exist.<sup>134</sup>

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128. *Id.* at 427-28, 722 P.2d at 1319-20 (citing 1937 WASH. LAWS, ch. 212, § 1).

129. *Id.*

130. *Id.*

131. *Id.* at 428, 722 P.2d at 1320.

132. *Id.* at 431-32, 722 P.2d at 1322.

133. *Id.* at 432, 722 P.2d at 1322 (citing *Hollander v. Valor Clothers, Inc.*, 91 A.D.2d 731, 457 N.Y.S.2d 1002-03 (1982)) (compensation denied because preexisting condition was active prior to employment; “some distinctive feature of the employment must cause disability by activating the condition”); *Perez v. Pearl-Wick Corp.*, 56 A.D.2d 239, 392 N.Y.S.2d 496 (1977) (granting compensation for disabling rheumatoid arthritis which had been dormant prior to work); *D'Angelo v. Loft Candy Corp.*, 33 A.D. 1077, 307 N.Y.S.2d 721 (1970) (awakening lumbosacral arthritis linked to nature of work activities).

134. *Dennis*, 44 Wash. App. at 433, 722 P.2d at 1323 (quoting *Perez*, 56 A.D.2d at 241, 392 N.Y.S.2d at 498).

After the Division I court issued its opinion, the Department of Labor and Industries filed a petition for review with the supreme court, which granted the petition.

#### D. *The State Supreme Court Opinion in Dennis*

In a unanimous opinion, the Washington State Supreme Court affirmed the Court of Appeals, Division I opinion in *Dennis*.<sup>135</sup> By so doing, the court ended 46 years of uncertainty as to the meaning of Washington's occupational disease statute,<sup>136</sup> and extended coverage to repetitive trauma cases and occupational disease aggravations of preexisting, nonwork-related conditions.<sup>137</sup> However, on the most crucial point, the burden of proof for determining whether or not a disability rises to the level of a compensable occupational disease, the supreme court rejected the path taken by the Division I court,<sup>138</sup> and adopted a new test far more workable than any previously espoused by Washington courts.<sup>139</sup>

With regard to the repetitive trauma issue, the court cited the legislature's early adherence to the proposition that "progressive physical deterioration due to work conditions could in time constitute a compensable disability."<sup>140</sup> In finding that Dennis' disability, brought on by 38 years of repetitive tin snipping, was an occupational disease, the court tacitly brought repetitive trauma conditions within the scope of the occupational disease statute.<sup>141</sup>

On the issue of occupational disease aggravation of a pre-existing, nonwork-related condition, the supreme court agreed

135. *Dennis*, 109 Wash. 2d at 468, 745 P.2d at 1296. Eight justices joined in the opinion, written by Justice Brachtenbach. Justice Dore did not take part in the disposition of the case.

136. See *supra* note 25.

137. *Dennis*, 109 Wash. 2d at 473-81, 745 P.2d at 1299-1303.

138. See *supra* note 123 and accompanying text.

139. *Dennis*, 109 Wash. 2d at 479-83, 745 P.2d at 1302-04.

140. *Id.* at 473, 745 P.2d at 1299.

141. *Id.* at 483, 745 P.2d at 1304. "It is reasonable to infer that the use of tin snips four to five hours per day over 38 years resulted in such wear and tear phenomena as to aggravate the osteoarthritis in Dennis' wrists to the point of disability. The evidence in the record is sufficient to support the inference that Dennis' disabling wrist condition arose naturally and proximately out of his employment." Clearly, 38 years of wear and tear cannot meet the "sudden" trauma requirement of the injury statute. See *supra* note 4. Moreover, the "naturally and proximately" language used by the court is directly lifted from the occupational disease statute. See *supra* note 5. Hence, the only logical conclusion one can reach is that repetitive trauma falls under the occupational disease category.



with and augmented the lower appellate court's opinion as to why such an aggravation should constitute a compensable occupational disease.<sup>142</sup> The supreme court started with the long-held proposition that the Industrial Insurance Act "is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker."<sup>143</sup> Next, the court noted that benefits for occupational disease-related disabilities are the same as for injury-related disabilities.<sup>144</sup> The court also noted that a worker whose disability is caused by an occupational disease acting upon a preexisting, nonwork-related condition is just as disabled as a worker whose occupational disease is in and of itself disabling. Consequently, the court reasoned that to not extend workers' compensation coverage to the aggravation situation would be contrary to the legislature's directive for liberal construction of the Industrial Insurance Act.<sup>145</sup> Moreover, the court pointed out that it had long maintained that in injury cases the worker is to be taken as he is found, regardless of preexisting infirmities. In support of this proposition, the court cited cases wherein it had previously held that when an injury aggravates a quiescent condition, the resulting disability is deemed attributable to the injury and workers' compensation benefits must be awarded.<sup>146</sup>

The court concluded that it would be anomalous to allow compensation when a sudden injury aggravates a preexisting, nonwork-related disease, but deny compensation when an occupational disease aggravates a preexisting, nonwork-related

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142. *Id.* at 470, 745 P.2d at 1297.

143. *Id.* (citing WASH. REV. CODE § 51.12.010 (1987)); *Sacred Heart Medical Center v. Carrado*, 92 Wash. 2d 631, 635, 600 P.2d 1015 (1979); *Lightle v. Department of Labor and Indus.*, 68 Wash. 2d 507, 510, 413 P.2d 814 (1966); *Wilber v. Department of Labor and Indus.*, 61 Wash. 2d 439, 446, 378 P.2d 684 (1963); *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 311, 82 P.2d 865 (1938); *Gaines v. Department of Labor and Indus.*, 1 Wash. App. 547, 463 P.2d 269 (1969)).

144. *Id.* at 471, 745 P.2d at 1298 (citing WASH. REV. CODE § 51.32.180 (1986)).

145. *Dennis*, Wash. 2d at 471, 745 P.2d at 1298.

146. *Id.* at 471-72, 745 P.2d at 1298 (citing *Groff v. Department of Labor and Indus.*, 65 Wash. 2d 35, 44, 395 P.2d 633 (1964); *Harbor Plywood Corp. v. Department of Labor and Indus.*, 48 Wash. 2d 553, 295 P.2d 310 (1956); *Kallos v. Department of Labor and Indus.*, 46 Wash. 2d 26, 30, 278 P.2d 393 (1955); *Jackson v. Department of Labor and Indus.*, 37 Wash. 2d 444, 448, 224 P.2d 338 (1950); *Miller v. Department of Labor and Indus.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939); *Ray v. Department of Labor and Indus.*, 177 Wash. 687, 33 P.2d 375 (1934)).

disease.<sup>147</sup> To the court, the important factor was whether a disability stems from employment conditions.<sup>148</sup> Therefore, the court held that workers who suffer disability resulting from occupational disease aggravations of preexisting, non-work-related conditions are entitled to compensation.<sup>149</sup>

The most significant thing that the supreme court did was to create an entirely new burden of proof for a disabled worker trying to establish that his disability arose "naturally and proximately" out of his employment.<sup>150</sup> Though the court agreed with previous Washington judicial analysis of the "proximately" element as being the equivalent of proximate cause,<sup>151</sup> the court rejected the tests for meeting the "naturally" element that had been formulated by the courts of Divisions I and II.<sup>152</sup> Instead, the court construed the "naturally" element in its ordinary sense to mean "as a natural result or consequence"<sup>153</sup> and tied the term to the "arising out of employment" language in the occupational disease statute.<sup>154</sup>

147. *Id.* at 472, 745 P.2d at 1298.

148. *Id.*

149. *Id.* at 474-76, 745 P.2d at 1299-1300. In ruling that occupational disease aggravations of preexisting, nonwork-related conditions could be compensable under the occupational disease statute, WASH. REV. CODE § 51.08.140 (1987), the supreme court refused to accept the argument of the Department of Labor and Industries which would have limited coverage to aggravations of asymptomatic conditions. Recognizing that Mr. Dennis' case did not present it with an aggravation of asymptomatic conditions, the court acknowledged that its position on the symptomatic-asymptomatic issue was dicta and merely stated that it was inclined to handle the situation of an aggravation of a preexisting, nonwork-related symptomatic condition through use of the segregation rules. See *supra* note 55.

150. *Id.* at 476-83, 745 P.2d at 1300-04.

151. *Id.* at 477, 745 P.2d at 1301 (citing *Ehman v. Department of Labor and Indus.*, 33 Wash. 2d 584, 206 P.2d 787 (1949)); *Seattle-Tacoma Shipbuilding Co. v. Department of Labor and Indus.*, 26 Wash. 2d 233, 241-42, 173 P.2d 786 (1946)). The court succinctly stated that the proximate cause element requires that "[t]he causal connection between a claimant's physical condition and his or her employment must be established by competent medical testimony which shows that the disease is probably, as opposed to possibly, caused by the employment."

152. The supreme court adhered to the court of appeals, Division I rationale in rejecting the court of appeals, Division II ruling that the "naturally" element of WASH. REV. CODE § 51.08.140 (1987) requires that the disabled worker prove that his disability is peculiar to his occupation and was caused by conditions unique to that occupation. *Dennis*, 109 Wash. 2d at 478, 745 P.2d at 1301. See also *Dennis*, 44 Wash. App. at 431-32, 722 P.2d at 1321-22. With regard to the Division I court's logical relation test, the supreme court found no basis for the test, and stated that such a test provided "little guidance" to a worker trying to establish his entitlement to workers' compensation benefits. *Dennis*, 109 Wash. 2d at 479, 745 P.2d at 1302.

153. *Dennis*, 109 Wash. 2d at 480, 745 P.2d at 1302 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1507 (1981)).

154. *Id.* at 481, 745 P.2d at 1303 (quoting WASH. REV. CODE § 51.08.140 (1987)).

Although it placed the "naturally" element in the context of the "arising out of employment" language, the supreme court was careful to disavow any connection between the "naturally" element and the "peculiar to the occupation" position taken by the Division II court.<sup>155</sup> The court held that to establish entitlement to benefits, in addition to proximate causation, a disabled worker must establish that his "occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions" of his particular employment.<sup>156</sup> To meet this requirement, the worker "must show that his or her particular work conditions more probably than not caused his or her disease or disease-based disability than conditions in everyday life or [in] all employments in general."<sup>157</sup> Moreover, the court dismissed the *Kinville* burden of proof which required the worker to show an increased risk of disease-based disability related to his particular occupation.<sup>158</sup>

In sum, the court ruled that for a worker to establish the "naturally" element in the occupational disease statute,<sup>159</sup> he must show that his disabling condition was caused by identifiable conditions of his work that are not generally present in his daily activities outside of his employment.<sup>160</sup> It follows that the "distinctive conditions" must be something less than "peculiar" to the worker's own job. However, the conditions must be a consequence of the worker's job. Though not conceptually simple or easy to apply, the "distinctive conditions" test removes from judicial consideration any focus upon the disease itself and instead focuses on the cause of the disease. In this way, occupational disease adjudications will henceforth more closely approximate injury-based adjudications under the "in the course of employment" requirement of the injury statute.<sup>161</sup>

## V. CONCLUSION

Battles about the concept of occupational disease were going on in Washington even before the Industrial Insurance

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 482, 745 P.2d at 1303-04 (citing *Sacred Heart Medical Center v. Carrado*, 92 Wash. 2d 631, 600 P.2d 1015 (1979)).

159. WASH. REV. CODE § 51.08.140 (1987).

160. *Dennis*, 109 Wash. 2d at 481, 745 P.2d at 1303.

161. WASH. REV. CODE § 51.08.100 (1987). See *supra* text accompanying note 51.

Act was enacted in 1911.<sup>162</sup> The first skirmishes were fought under the flag of common law.<sup>163</sup> Later, under the Industrial Insurance Act, the fighting focused upon enumerated listings of diseases and whether the listings were under- or over-inclusive.<sup>164</sup> Finally, since 1941,<sup>165</sup> the conflict has been over occupational disease,<sup>166</sup> and the meaning of the term "occupational disease."

In attempting to decipher the occupational disease statute, the Washington courts consistently disagreed about the meaning of the words "naturally and proximately."<sup>167</sup> Though agreeing that the word "proximately" referred to the legal standard of proximate cause, some courts ignored the word "naturally" and limited themselves to an examination of proximate cause only.<sup>168</sup> Other courts believed that the statute "must be construed so as to give effect to every word contained therein," and thus gave the word "naturally" some meaning beyond that of proximate cause.<sup>169</sup> These latter courts ruled that the word "naturally" meant that only conditions of employment could produce the occupational disease in order for the disease to be compensable. Because disease was not compensable unless it was a condition of employment, a disability that resulted from an occupational disease aggravating or "lighting up" a preexisting nonoccupational condition was not compensable.<sup>170</sup> The Washington Court of Appeals, Division I, on the other hand, viewed the words "naturally and proximately" as requiring that a disability be proximately caused by work-related conditions and that the conditions and the disa-

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162. See *supra* notes 23-30 and accompanying text.

163. *Id.*

164. See *supra* notes 41-43 and accompanying text.

165. See *supra* notes 45-48 and accompanying text.

166. WASH. REV. CODE § 51.08.140 (1987).

167. *Id.* § 51.32.180. See *supra* text accompanying notes 85-161.

168. *Simpson*, 32 Wash. 2d at 479, 202 P.2d at 452. The court interpreted the legislative intent of the occupational disease statute by construing the meaning of "proximate cause" and disregarding the word "naturally." Division II rejected this interpretation.

169. *Kinville*, 35 Wash. App. at 86-87, 664 P.2d at 1314 (citing *In re Marriage of Timmons*, 94 Wash. 2d 594, 617 P.2d 1032 (1980)).

170. See BOARD OF INDUSTRIAL INSURANCE APPEALS, DIGEST OF LEADING WASHINGTON CASES ON WORKMEN'S COMPENSATION LAW 158 (1972), wherein a Board of Industrial Insurance Appeals commentator states that the supreme court cases following *Simpson* stand for the proposition that "the mere aggravation or acceleration of a disease process by working conditions does not make it an 'occupational disease' which 'arises naturally and proximately' out of employment."

bility be logically related.<sup>171</sup> Finally, the Washington Supreme Court held that to meet the "naturally and proximately" requirement, a disabled worker must show that his or her disability was proximately caused by distinctive work conditions, as opposed to nonwork conditions.<sup>172</sup>

All of the standards set forth in the preceding paragraph must be considered in the context of the legislature's goal in promulgating the Industrial Insurance Act. The goal is to compensate workers for disabilities that they sustain as a direct result of their work, as opposed to those disabilities caused by the natural progression of life.<sup>173</sup> Arguably, the main thrust of enumerated lists, repetitive trauma and aggravation exceptions, "peculiar to the occupation" standards, "logical relation" tests, and even the *Dennis* court's "distinctive conditions" requirement has been to attempt to eliminate from coverage those disabilities not directly caused by work, but by everyday life. It is well established that the Industrial Insurance Act was not meant to provide workers with a general health and accident insurance plan.<sup>174</sup> As Washington law amply illustrates, however, it is possible to ham-fistedly draft these

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171. *Dennis*, 44 Wash. App. at 435, 722 P.2d at 1324. Although all of these courts have acknowledged the legislature's directive to use the proximate cause test when adjudicating occupational disease claims, the pertinent case law lacks any indication that the legal construct of "proximate cause" is used in workers' compensation cases as it is used in other civil litigation. In Washington, proximate cause is divided into two distinct parts, cause in fact and legal causation. *Hartley v. State*, 103 Wash. 2d 768, 778-79, 698 P.2d 77, 83 (1985). The first part, cause in fact, deals with the direct physical connection existing between the worker's employment and the worker's disability. As a factual issue, in order for the worker to establish a valid claim, the worker must prove that "but for" the worker's employment the worker would not have become disabled. *Id.* at 778, 698 P.2d at 83. The second part of proximate cause, legal causation, "involves a determination of whether legal liability should attach (or in the case of workers' compensation, whether benefits should be given) as a matter of law considering the existence of cause in fact. *Id.* at 779, 698 P.2d at 83. Given the facts of each case, the courts are supposed to mingle public policy considerations and common sense in order to decide whether the connection between the cause and the effect is too remote to establish a claim. *Id.* at 781, 698 P.2d at 84. Clearly, the courts have been using the "but for" test of cause in fact, but the concept of legal causation does not appear to have been raised in workers' compensation cases.

172. *Dennis*, 109 Wash. 2d at 481, 745 P.2d at 1303.

173. *Dennis*, 44 Wash. App. at 426-27, 722 P.2d at 1319.

174. The *Favor* court stated:

We have heretofore pointed out that our workmen's compensation act was not intended to provide workmen with life, health, or accident insurance at the expense of the industry in which they are employed. It was intended to provide, at the expense of the industry employing them, a sure and speedy relief for workmen (or their dependents) where disability or death resulted from injuries sustained in the course of their employment or from

"weeding out" rules so broadly that they wind up preventing workers with valid claims from getting the benefits to which they are entitled.<sup>175</sup> Yet, the proximate cause standard, coupled with the supreme court's "distinctive conditions" requirement, offers the most simple and effective way to exclude ordinary diseases from coverage without withdrawing benefits from those disabled by work-related activities.<sup>176</sup>

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occupational diseases arising naturally and proximately from extrahazardous employment.

*Favor v. Department of Labor and Indus.*, 53 Wash. 2d 698, 703, 336 P.2d 382, 385 (1959) (citing *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1916)); *Sterz v. Industrial Insurance Comm.*, 91 Wash. 588, 158 P. 256 (1916); *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101 (1911)).

175. The Department of Labor and Industries has already issued a statement limiting *Dennis* to organic conditions. The policy statement, dated January 6, 1988, reads as follows:

The *Dennis* case expands coverage for organic occupational disease to include disability caused by repetitive trauma and aggravation of preexisting non-occupational diseases. The department does not view this opinion as having any effect on the adjudication of stress claims.

The opinion reaffirms that not all diseases contracted on the job are compensable, and that distinctive conditions of employment must be the proximate cause of the disease or disease-based disability. Distinctive conditions of employment are recognizable or characteristic risks of a worker's employment even though similar employments may not have those risks.

In adjudication of a claim, the department should determine the following:

1. Whether the disease is a natural consequence of a distinctive condition of employment; i.e., a natural consequence of a recognizable or characteristic risk of the worker's work process;
2. Whether the disease is caused by conditions not coincidental to the employment, i.e., conditions not directly related to the employment;
3. Whether the disease is common to non-employment life and all employment generally;
4. The proximate cause of the disease.

If it is determined that a natural consequence of a distinctive condition of employment proximately caused the disease or disease-based disability, the claim should be allowed. On the other hand, if the disease is proximately caused by conditions not directly related to the employment, or if the disease or disease-based disability is common to non-employment life and all employment generally, the claim is not compensable.

Policy Statement Issued by the Washington Department of Labor and Industries (Jan. 6, 1988). The reader should note that the Department of Labor and Industries is once again focusing (wrongly) on the disease and not its cause.

176. For example, take the hypothetical case of a nurse who contracts a disabling case of rubella as a result of working with infected patients. She would not have become disabled "but for" working with those patients. Contact with rubella contagion is a distinctive condition of her work that, although present in everyday life

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to some small extent, is present to a great degree in her employment. In contrast, consider the case of a pizza delivery person who contracts a disabling case of rubella after drinking from the glass of an infected fellow employee. Can it be said that the second worker's disability was caused by a distinctive condition of his employment, as opposed to conditions present in his everyday life, even though the worker would not have contracted the disability "but for" his work? Clearly not. It is apparent from the above examples that even under the "distinctive conditions" test, the determination of compensability is still subject to the prejudice of the decisionmaker. However, the determination is arguably less subject to bias than decisions based upon older Washington tests. It should be noted that the delivery person's work activities do not directly involve being exposed to contagion. In cases where a worker contracts a disease, but the worker's employment activity did not involve being exposed to the disease as a matter of course, the worker has an action at law if third party negligence is involved. See *McCarthy v. Department of Labor and Indus.*, 46 Wash. App. 125, 730 P.2d 681 (1986) (office worker regularly exposed to cigarette smoke had cause of action against employer for damage arising from her pulmonary problems). See also *Kumpf, Occupational Disease Claims Under the Workers' Compensation Reforms*, 12 SETON HALL L. REV. 470, 472 (1982).