OPINION
63-283

August 20, 1963 (OPINION)

WORKMEN'S COMPENSATION BUREAU

RE: Preexisting Conditions

This is in response to your letter in which you ask for an opinion on the construction of section 65-05-15 of the North Dakota Century Code, which provides as follows:

> AGGRAVATION OF INJURY OR DISEASE - COMPENSATION AND BENEFITS NOT PAID FOR PREEXISTING CONDITION. In case of aggravation of an injury or disease existing prior to a compensable injury, compensation, medical, hospital or funeral expenses, or death benefits, shall be allowed by the bureau and paid from the fund only for such proportion of the disability, death benefits, or expense arising from the aggravation of such prior disease or injury as reasonably may be attributable to such compensable injury. But any compensation paid on the basis of aggravation shall not be less than ten dollars per week unless the actual wages of claimant shall be less than ten dollars, in which event the actual wages shall be paid in compensation."

Your specific question is on the following hypothetical case:

> An individual receives a compensable injury in the course of his employment to his back. In the course of his treatment with a medical practitioner, it is discovered that this particular claimant has an arthritic condition of the back and further that this particular condition has been aggravated by the accident. The result is that the arthritic condition requires treatment."

You then ask is section 65-05-15 applicable upon the fact that the preexisting condition existed, in determining the amount of compensation payable to the claimant, or in the alternative would the preexisting condition have been of such nature to have caused a previous disability before there could be a reduction in the amount of compensation payable to this particular individual.

In construing this section, we must take in to consideration subsections 8 and 9 of section 65-01-02, which define what constitutes an injury sustained in the course of employment.

The North Dakota Supreme Court in Pace v. Workmen's Compensation Bureau, 51 N.D. 815, on page 823, said:

> * * * We have summarized the evidence briefly and think that the findings of the trial court, that the death resulted from an injury received in the course of the employment, have sufficient support in evidence. It is quite immaterial that the decedent may have brought with him a disability. The

evidence supports a finding that the disability brought with him was aggravated by the conditions under which he was compelled to labor and that ultimately there came a time when his weakened heart and arteries could no longer stand the strain, when he suffered a collapse and died from apoplexy a few days later.* * *

> * * * The court found that the high blood pressure was wholly or partly due to the heat; that this risk of the employment was a contributing cause of his condition and his death. In other words, the excessive and unusual heat was the proximate cause of the collapse and the subsequent bursting of the blood vessel which resulted in death.* * *"

It is to be noted that this was the rule of the North Dakota Supreme Court in 1924, which was some time before section 65-05-15 was enacted in 1931. The North Dakota Supreme Court in Tweten v. North Dakota Workmen's Compensation Bureau, 69 N.D. 369, in 1939, had the section in question under consideration. On page 381, the Court discusses this section and construes the section to some degree on a petition for rehearing. In this case the claimant died from lobar pneumonia. A claim was presented to the bureau which was rejected by the bureau on the basis that the alleged disability was due to a disease not proximately caused by the deceased's employment. The evidence disclosed that the claimant was a World War veteran and had received injuries from as during his service in the war. Evidence also showed that he was working on buildings on the fair grounds repairing and constructing fences and planting trees when the weather was cold, damp and rainy, and also during a time when the temperature fluctuated as much as 27 degrees in a day - from 29 degrees to 65 degrees. The evidence also disclosed that while he was working he had to crawl under a bowery to get out of the cold, drizzling rain. The Court said:

> * * * And, it is contended that inasmuch as the evidence discloses that the deceased, Tweten, had received injuries from gas during his service in the World War that the court must determine what proportion of the compensable injury was due to the prior condition and what proportion was due to the aggravation attributable to the injury Tweten sustained in the course of his employment. In our opinion, this contention is not well founded.* * *"

The Court then referring to the section in question said that it applies only to the aggravation of a preexisting disease; it does not require or permit a structural weakness to be considered in the allowance of compensation. Where an employee is afflicted with a disease, and in the course of his employment becomes disabled due to an aggravation of such prior disease, compensation is allowable only for the "proportion of the disability due to the aggravation of such prior disease as may be reasonably attributable to the injury" that has been sustained during the course of the employment.

The Court continued by saying:

> * * * The North Dakota Workmen's Compensation Act does not proceed upon the theory that every employee, on entering into

> employment, is in perfect health and free from structural weakness. Compensation is not made to depend upon the condition of health of the employee or upon his freedom from liability, to injury through a constitutional weakness or latent tendency; compensation is awarded for an injury which is a hazard of the employment. If the injury is the proximate cause of the death or disability for which compensation is sought, the physical condition of the employee at and prior the time of the injury is important only if the injury for which compensation is sought was occasioned by a disease that existed prior to the injury for which compensation is sought.* * *" (Emphasis supplied.)

The Court concluded that the injury which produced death was lobar pneumonia, which arose in the course of and was proximately caused by the employment, and determined that the claimant was entitled to compensation.

It is observed that the Court reached similar conclusions from the two cases mentioned, even though in the first case the aggravation statute was not in existence. The more recent expression by the North Dakota Supreme Court on the question is found in Gullickson v. North Dakota Workmen's Compensation Bureau, 83 N.W.2d. 826. In allowing full compensation in this case the Court on page 832 said:

> The evidence clearly shows that claimant had a more or less dormant arthritic condition prior to Oct. 31, 1953. It, however, did not prevent him from carrying on his usual work including the lifting and carrying of quarters and halves of beef, and would not have done so if nothing had happened. After the fall, however, he began to suffer pains, especially in his left hip and had to give up his work. The pains increased to the extent that he had to have the Smith-Peterson cup arthroplasty operation performed. It follows that the operation was not the result of the arthritic condition, but that the fall aggravated that condition and made the operation necessary."

The Court adopted the ruling of another court which said:

> * * * 'If that conditon was lighted up and made active by the injury, then the condition was the result of the injury and not of the previous arthritic condition'."

Section 65-05-13 of the North Dakota Century Code by itself is clear in its meaning, but its application to real cases is more difficult, especially when considered in connection with subsections 8 and 9 of section 65-01-02. It seems that the section in question is more theoretical than practical in its application. It is the practical and legal application which is difficult.

It is a known medical fact that the human body, as such, after reaching a certain age, (various in each individual), begins to enter a degenerative process. The progress of the degenerative process varies in each individual. However it is an established fact that the degenerative process to some degree is in progress after a person reaches a certain age. It would be legally ridiculous to adopt a

position that because a person is a certain age that his body is deemed to have degenerated by a certain percentage and to treat same as a preexisting condition or merely as an aggravation of his preexisting condition for purposes of compensation benefits where an injury is sustained in the course of employment.

It is to be noted that the statute provides: "In case aggravation of an injury or disease prior to a compensable injury." It does not provide: "In case an injury sustained in course of employment aggravates, etc." This would mean that the statute applies only where the aggravation is not the result of an injury but an aggravation without an injury.

From reviewing the authorities on the question, the conclusion one must reach is that in the absence of clear, convincing proof that a disabling injury or disabling preexisting condition is causing the disability, it is the "straw that broke the camel's back" which is significant and controlling. If such "straw" was an injury sustained in the course of employment and causes a disability, said disability is compensable. Even if the physical condition of an employee predisposed him to certain disability, an injury sustained in the course of employment producing a disability would be compensated as such but not on an aggravation basis.

In answer to your specific question, if the word "back" were substituted for the word "hip" in the Gullickson case, the result would still be the same. It is, therefore, our opinion that under section 65-05-15, the preexisting disease or condition would have to be of such nature so as to be disabling independent of an injury sustained in the course of employment before a reduction would be justifiable under the present Workmen's Compensation Act. The test seems to be: "Would he be presently disabled if he had not sustained an injury in the course of employment?"

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