Worker’s Compensation: Upholding the Compensation Principle

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INTRODUCTION

Worker's compensation is a statutory scheme designed to compensate individuals for work-related injuries and diseases. Unlike the law of torts, worker's compensation is not concerned with righting a wrong. Neither is it a personal insurance policy for the employee. Rather, it is a system aimed at compensating employees for injuries and diseases caused by, or related to, their employment.

During the survey period, the Supreme Court of Nebraska decided four significant worker's compensation cases. In *Sandel v. Packaging Company of America*, the court permitted recovery for a gradual, wear and tear injury and expressly set out the conditions necessary to satisfy the requirement that an accident happen "suddenly and violently." A sharply divided court announced in *McGinn v. Douglas County Social Services Administration* that when an injury is caused by the elements—such as a thunderstorm—the court will employ the "increased risk" test to determine whether the injury arose out of the worker's employment. In *Husted v. Peter Kiewit & Sons Construction Co.*, the court, again sharply divided, ruled that the phrase "more likely" meant only a "possibility" and, thus, a physician's testimony that it was more likely than not that Husted had sustained his neck injury at the same time he injured his back was insufficient to satisfy the preponderance of the evidence standard of proof. Finally, in a case of first impression, *Osteen v. A.C. & S., Inc.*, the court adopted the "last injurious exposure" rule to fix liability for an oc-

4. *Id.* § 1.20, at 2.
7. *Id.* at 158, 317 N.W.2d at 916.
8. 211 Neb. 72, 317 N.W.2d 764 (1982).
9. *Id.* at 76, 317 N.W.2d at 767.
11. *Id.* at 114, 313 N.W.2d at 251.
occupational disease.  

These cases illustrate the requirement in Nebraska that a worker's compensation claimant prove by a preponderance of the evidence that he either incurred injuries from a work-related accident or he suffers from an occupational disease. In either case, the claimant must demonstrate that his injury or disease arose out of, and in the course of, his employment. If the worker is suffering from an occupational disease, the court must determine which employer or insurer is liable for the compensation. The raison d'être of worker's compensation is the compensation principle: to compensate employees for work-related injuries and occupational diseases. This article will analyze the Sandel, McGinn, Husted and Osteen decisions with emphasis on whether the Supreme Court of Nebraska is upholding the compensation principle.

BACKGROUND

With the advent of the Industrial Revolution, a new class known as the working poor arose in Europe and America. Peasant and farm laborors crowded into the cities to work the new machinery in the factories. As mechanization expanded, so the number of industrial accidents multiplied. Although the new machinery turned out many devices, it also turned out many disabled workers. Those who operated the new machinery frequently were maimed or killed.

The only legal remedy available to the injured worker was the common law action in tort for negligence. Since the employer could raise three formidable defenses to this action and co-work-

13. Id. at 288, 307 N.W.2d at 519.
14. The author recognizes the irony of referring to a worker as "he" when the United States workforce is comprised of approximately 40% women. See, e.g., Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1166 (1971). The use of masculine pronouns, however, is merely for stylistic purposes and, unless otherwise indicated, no inference should be drawn regarding the gender of a particular person.
15. See note 110 and accompanying text infra.
17. Id. at 826.
18. 1 A. LARSON, supra note 3, § 4, at 3.
20. Id.
22. The employer had available the defenses of assumption of the risk, contributory negligence and the fellow-servant exception. Those defenses proved particularly effective, as German statistics indicate that approximately 29% of industrial accidents were held to have been caused by the injured worker himself. Another 5% were determined to have resulted from a co-worker's negligence. Only about
ers were reluctant to testify against their employers, litigation frequently proved to be lengthy and expensive without providing much relief for the injured worker. When permitted, recovery usually resulted in only a small judgment. As a consequence, disabled workers and their families frequently became paupers or beggars, dependent on public charity. Financial compensation in this form was inefficient, ineffective and degrading. It soon became apparent that some other means of dealing with the increasing number of industrial accidents was necessary.

In response to this problem, first Germany and later England began to develop the system now known as worker’s compensation. Designed to ease the burden on injured workers, the system required industry to pay for work-related accidents. Eventually the scheme was adopted in America.

A number of theories have been offered to justify and explain the worker’s compensation system. The social compromise theory suggests that worker’s compensation can be viewed as a legislative bargain between employers and employees. Other theories suggest that industry should bear the compensation burden, either because it caused the injury or because it is better equipped to distribute the costs to the consumer. Whatever the rationale for the development of worker’s compensation, its pur-

17% of the accidents were attributed to negligence on the part of the employer. 1 A. Larson, supra note 3, § 4.30, at 25-27.
23. Id. § 4.30, at 28.
24. Note, Beyond Idle Connections, supra note 2, at 507.
25. American studies of industrial accident litigation prior to the advent of worker’s compensation demonstrate that recovery was infrequent and, when permitted, the sum recovered usually was small. A study undertaken by the New York Commission in 1910 revealed that in approximately 43% of the cases examined the injured worker was denied recovery. Moreover, approximately 40% of those workers who successfully prosecuted their claims received compensation of $500.00 or less. 1 A. Larson, supra note 3, § 4.50, at 32.
26. Id. § 2.20, at 6-7.
27. Larson suggests that worker’s compensation is the most efficient and dignified means of providing for the injured worker. Id. § 2.20, at 5.
28. The statistics make it quite clear that victims of industrial accidents were going uncompensated. Id. § 4.30, at 27.
29. Id. § 5.10, at 33.
33. According to this theory, both employers and employees gained and lost certain advantages when worker’s compensation was enacted. The employer is held liable, regardless of fault, while the amount the employee can recover is limited by statute. Id. at 15.
34. Id. at 14.
pose is clear—to award compensation for injuries caused by employment.35

Because it is statutorily enacted, worker’s compensation is separate and distinct from the common law of tort.36 Worker’s compensation attempts to provide compensation in the most efficient and dignified manner for work-related injuries.37 Fault is irrelevant.38 The defenses of act of God, act of third person and contributory negligence are not available in worker’s compensation.39 Rather, emphasis is placed on the relationship between the injury and employment instead of on the conduct of the parties.40 Only injuries that are work-related and produce disabilities that affect earning power are compensated,41 and recovery is limited by a statutory schedule of payments.42 Compensation is not an attempt to restore to the worker what he has lost.43 Rather, it attempts to give the worker a sum, which, when added to his remaining earning ability, will permit him to exist without becoming a burden on public charity.44

Although fault is irrelevant, a causal connection between the injury and employment is essential.45 Britain and forty-two American states46 require that an injury arise out of, and in the course of, one’s employment.47 In order to recover in Nebraska, the injured worker must prove by a preponderance of the evidence48

35. Id. at 16.
36. The tort connection fallacy has been quite prevalent among common law-trained judges and lawyers. The tort notion that most frequently appears is that the fault of the employee in his own accident is relevant. 1 A. Larson, supra note 3, § 1.20, at 3.
38. This legal principle is alien to common law negligence. Weisgall, Product Liability in the Workplace: The Effect of Worker’s Compensation on the Rights and Liabilities of Third Parties, 1977 Wis. L. Rev. 1035, 1040.
39. 1 A. Larson, supra note 3, § 2.30, at 9. However, the Nebraska Supreme Court retained the defense of act of God in McGinn v. Douglas County Social Services Administration, 211 Neb. 72, 317 N.W.2d 764 (1982).
40. Beyond Idle Connections, supra note 2, at 508.
41. 1 A. Larson, supra note 3, § 2.40, at 10.
43. 1 A. Larson, supra note 3, § 2.50, at 11.
44. Id. § 2.50, at 11.
45. Arnold, supra note 5, at 16.
47. “Arising out of" means the accident must have its origin in a risk incidental to employment. Id. at 580. In Nebraska, this requirement is codified at Neb. Rev. Stat. § 48-101 (Reissue 1978).
that his injury resulted from an accident that arose out of, and in
the course of, his employment.\textsuperscript{49}

As a prerequisite to recovery, the statutes required that the
employee suffer an injury that was causally connected to his em-
ployment. Thus, difficulties developed with the "accident" require-
ment in the early twentieth century\textsuperscript{50} and continue to exist
today.\textsuperscript{51} Accidents were first defined as "unlooked for mishaps,"
traceable to a definite time, place, and occasion or cause.\textsuperscript{52} Since
they do not conform to the traditional definition of "accident,"
wear and tear injuries provide an increasing source of litigation.\textsuperscript{53}
These injuries develop gradually and, thus, do not seem to satisfy
the requirement that an accident happen suddenly and violently.\textsuperscript{54}
Nor can such injuries be classified as occupational diseases, be-
cause they are not peculiar to a particular trade or industry.\textsuperscript{55}
Whether worker's compensation will evolve to provide compensa-
tion for this type of injury is an unresolved issue in several
jurisdictions.\textsuperscript{56}

Early worker's compensation statutes and court decisions de-


\begin{thebibliography}{99}
\bibitem{49} These requirements are equally applicable to occupational diseases. \textit{Neb. Rev. Stat.} § 48-101 (Reissue 1978). Interpretational tests which developed to deter-
mine whether an injury arose out of one's employment include the peculiar risk
test, the foreseeability test, the proximate cause test, the increased risk test, the actual risk test, the street risk test and the positional risk test. Note, \textit{Worker's Com-
\bibitem{51} \textit{See notes 115-19 and accompanying text infra.}
\bibitem{52} 1B A. \textit{LARSON, supra} note 3, § 37.30, at 7-8. In the early twentieth century,
accidents and diseases were thought to be mutually exclusive. \textit{Id.} § 37.20, at 7-4.
\bibitem{53} \textit{See Arnold, supra} note 5, at 13.
\bibitem{54} \textit{Id.} at 16-19.
\bibitem{55} \textit{Id.} at 19-20.
\bibitem{56} As a trend, the direction is toward recognition that gradually developed in-
juries are compensable. \textit{Id.} at 16-17.
\bibitem{57} \textit{See note 53 supra.}
\bibitem{58} \textit{See Arnold, supra} note 5, at 13.
\bibitem{59} \textit{Arnold, supra} note 5, at 19.
\bibitem{60} Nebraska first enacted compensation coverage for occupational diseases in
1943. 1943 Neb. Laws ch. 113, § 1, at 397, \textit{currently codified at Neb. Rev. Stat.} § 48-
101 (Reissue 1978). The Nebraska Supreme Court first encountered the problems
presented by an occupational disease in \textit{Hauff v. Kimball}, 163 Neb. 55, 77 N.W.2d 683
(1956). There the court stated that "[A]n occupational disease results from the con-

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day the prevalent issue is not whether occupational diseases should be compensable; rather, it is which employer or insurance carrier should pay the compensation. In summary, worker's compensation is a system designed to supply security to employees for work-related accidents and diseases, and to eventually distribute the costs to consumers.

FACTS AND HOLDINGS
Sandel v. Packaging Company of America

Dorothy Sandel had been employed by Packaging Company since 1967. During that time, she had been assigned to perform a number of different jobs. In November, 1979, she was assigned the job of operating a slitter scorer machine. A month later, she began complaining of discomfort in her left arm and the pain continued and increased. The following May, Sandel's arm began swelling and she was forced to seek medical treatment. A physician diagnosed her condition as lateral epicondylitis. Sandel filed suit in the Workmen's Compensation Court, which permitted recovery. Her employer appealed, arguing that Sandel had not sustained an accident within the meaning of the Nebraska Workmen's Compensation Act. The Nebraska Supreme Court affirmed the award, holding that the requirement of continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time ... " and announced that the date of disability was the date the disease manifested itself.

62. 1 A. LARSON, supra note 3, § 2.70, at 14.
63. 211 Neb. 149, 317 N.W.2d 910 (1982).
64. Id. at 150, 317 N.W.2d at 912.
65. Sandel had operated a semiautomatic labeling machine, an airhammer, and had been a forklift driver. Between 1970 and 1973, she developed bursitis in her right arm, which was successfully treated. Id. at 150-51, 317 N.W.2d at 912.
66. Operation of the machine required repetitive flexion-extension activity of the hand and wrist. A physician testified that Sandel's condition was due to repetitive flexion-extension activity. Id. at 151-52, 317 N.W.2d at 912-13.
67. Sandel was uncertain as to whether she began to notice the pain in December of 1979 or January of 1980. Id. at 151, 317 N.W.2d at 913.
68. Sandel's arm began to swell on May 29, 1980 and by 11:30 a.m. the pain had become so severe that she reported to the first aid station. Id. at 152, 317 N.W.2d at 913.
69. This condition is commonly referred to as tennis elbow. Id.
70. Id. at 150, 317 N.W.2d at 912.
71. Id. NEB. REV. STAT. § 48-151(2) (Reissue 1978) defines an accident as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."
that an accident happen suddenly and violently did not mean instantaneously and with force. Rather, the requirement was satisfied if the accident occurred at an identifiable point in time, requiring the employee to discontinue work and seek medical treatment.

McGinn v. Douglas County Social Services Administration

McGinn was employed by Douglas County as a social worker. While driving to visit a client, a severe wind and rain storm developed. Visibility was virtually obscured and McGinn was forced to pull over to the side of the road. While waiting for the storm to subside, a tree snapped and fell on top of his car. McGinn suffered a broken neck which left him paralyzed and permanently disabled. He brought an action in the Workmen's Compensation Court and was granted benefits.

In a four to three decision, the Nebraska Supreme Court reversed, holding that the evidence did not support the finding that the trees in McGinn's area posed a greater risk of injury than did the trees in other parts of town. The court further held that when an injury is caused by the elements, it will not be compensible unless the employee is exposed to a greater hazard in the area where the injury occurred than is the public generally.

Husted v. Peter Kiewit & Sons Construction Co.

Sherman Husted was employed by Peter Kiewit as a carpen-

72. 211 Neb. at 158, 317 N.W.2d at 916.
73. Id.
74. 211 Neb. 72, 317 N.W.2d 764 (1982).
75. Id. at 73, 317 N.W.2d at 766.
76. The storm was accompanied by winds of up to 100 m.p.h. Id. at 74, 317 N.W.2d at 766.
77. Id.
78. Id.
79. Id.
80. The court found that McGinn's injury arose out of his employment because he was exposed to a greater hazard than the general public. Specifically, the court found that the presence of trees increased the dangerous effect of the storm. Id. at 74, 317 N.W.2d at 766.
81. The court concluded that there was no evidence to support the finding that the trees in the area where McGinn was injured presented a greater risk than the trees in other areas. The record indicated that trees were damaged and blown down throughout the city. Id. at 74, 317 N.W.2d at 766.
82. Id. at 76, 317 N.W.2d at 768. Justice White filed a strong dissent, arguing that the court should abandon the increased risk test to determine whether an injury arose out of employment and should instead adopt the positional risk test. Id. at 79-80, 317 N.W.2d at 769.
ter. While lifting roofing onto a conveyor belt, he injured his lower back. Despite compliance with his physician's orders of medication and bed rest, Husted began complaining of neck pain. Medical examinations were made once again, and it was discovered that Husted had sustained a neck injury.

The Workmen's Compensation Court awarded Husted benefits for both his back and neck injuries. The award was based on a physician's testimony that it was "more likely" that Husted had sustained his neck injury at the same time he injured his back, rather than while he was at home in bed. By a four to three margin, the Nebraska Supreme Court reversed, holding that the words "more likely" constituted only a possibility. Thus, the preponderance of the evidence standard had not been met.

Osteen v. A.C. & S., Inc.

Albert Osteen had worked as an insulator for thirty-six years. During that time, he had frequently worked with asbestos insulation for a number of employers. He last worked with asbestos materials while employed by a subsidiary of Peter Kiewit & Sons Construction Company. In February, 1977, Osteen became ill. 

94. Id. at 109, 313 N.W.2d at 249.
95. Id.
96. Id. at 110, 313 N.W.2d at 249.
97. Husted began seeing Dr. Minnard in November, 1976, about his neck and continued to see him until July, 1979, when surgery was recommended. Id. at 110-11, 313 N.W.2d at 249-50.
98. In July, 1979, Dr. Browne performed a cervical myelogram which indicated that a herniated cervical disc was causing Husted's neck pain. Id. at 111, 313 N.W.2d at 250.
99. His back injury was not disputed. Id. at 109, 313 N.W.2d at 249. On rehearing, the Workmen's Compensation Court found that the cervical disorder was causally connected to the October 11 accident. Id. at 110, 313 N.W.2d at 249.
100. Dr. Minnard destroyed his medical report which linked the two injuries, after being advised that the attorneys would not pay for it. Dr. Browne testified that he could find no causal connection between the two injuries. Id. at 112-13, 313 N.W.2d at 250.
101. Id. at 113, 313 N.W.2d at 250.
102. The court affirmed as to the back injury, but reversed as to the neck injury. Id. at 114, 313 N.W.2d at 251.
103. The court commented that the testimony lacked the definiteness and certainty necessary for it to be the basis of a compensation award. Id.
104. Id.
106. Osteen began working as an insulator in 1941 and continued until a few weeks before his death in 1977. Id. at 284, 307 N.W.2d at 517.
107. Osteen was a member of Insulators and Asbestos Workers Local 39. His employment was by the "union hall" method, which meant that Osteen was sent out by a union agent to perform jobs for different employers whenever requested. Id.
108. Peter Kiewit & Sons Construction Company was the last to employ Osteen.
ill and was admitted to a hospital. Exploratory surgery revealed that he was suffering from a form of cancer known as peritoneal mesothelioma. Osteen died in March.

Osteen's widow filed suit in Workmen's Compensation Court, attempting to recover death benefits. Mrs. Osteen contended that peritoneal mesothelioma was an occupational disease caused by prolonged exposure to asbestos materials. The court allowed recovery, ruling that the cancer was an occupational disease. Employing the "last injurious exposure" rule, the court held the last employer entirely liable for the award. The Nebraska Supreme Court affirmed the award and endorsed the use of the last injurious exposure rule.

**Analysis**

Since its purpose is to ease the financial burden on victims of industrial accidents and diseases by transferring the cost of work-related accidents from workers to industry, and to prevent lengthy and expensive litigation, worker's compensation statutes should be construed liberally. As aptly stated by the Nebraska Supreme Court, the beneficial purposes of worker's compensation should not be thwarted by strict interpretations of the law. Sandel, McGinn, Husted and Osteen will be analyzed with this principle in mind. Each of these decisions focuses on a separate

Osteen's co-workers testified that Osteen had worked with asbestos materials while employed by Kiewit. Id. at 291, 307 N.W.2d at 520. A one judge hearing ordered Vaughn Insulation to pay the entire award but, at a rehearing, it was determined that Kiewit was the last to expose Osteen to the asbestos. Kiewit was then ordered to pay the entire award. Id.

99. Osteen entered the hospital for diagnosis of an abdominal disorder. Id. at 286, 307 N.W.2d at 518.
100. Id.
101. Id.
102. Id. at 284, 307 N.W.2d at 517.
103. To support her contention, Mrs. Osteen offered evidence showing that peritoneal mesothelioma was almost negligible in the population at large, while the disease approached 7% in asbestos workers. Id. at 286-87, 307 N.W.2d at 518.
104. Id. at 284, 307 N.W.2d at 517.
105. Id.
106. Since the Nebraska Workmen's Compensation Act is silent on the topic, the court stated that it could utilize either apportionment or the last injurious exposure rule. The court chose to use the latter because it eliminated guesswork. Id. at 288-89, 307 N.W.2d at 518-19.
element which must be established in a worker's compensation case. Sandel focuses on the requirement that the claimant must have suffered an accident or an occupational disease. McGinn deals with the requirement that an accident arise out of, and in the course of, the worker's employment. Husted focuses on the standard of proof the claimant must sustain. Osteen raises a problem peculiar to occupational disease cases. Once the occupational disease is established, the court must determine which employer or insurer is liable.

Wear and Tear Injuries: The “Suddenly and Violently” Requirement

To recover compensation benefits in Nebraska, the claimant must demonstrate that he has sustained a work-related injury by accident or is suffering from an occupational disease. An occupational disease results from prolonged exposure to a hazardous substance during employment and is considered to be peculiar to a particular trade. The statutory definition of “accident” consists of three elements which the claimant must satisfy before recovery is permitted. The first element requires that the injury be unexpected or unforeseen; the last element requires that the accident produce objective symptoms of an injury at the time it occurs. However, it is the second element—the requirement that an accident happen “suddenly and violently”—which is perhaps the most ambiguous and confusing.

The suddenly and violently requirement has created difficulty because worker's compensation cases traditionally were decided categorically. One either suffered from an occupational disease or

110. NEB. REV. STAT. § 48-101 (Reissue 1978) indicates that compensation will be permitted "when personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation. . . ."  
111. See note 60 supra.  
112. Ritter v. Hawkeye Security Ins. Co., 178 Neb. 792, 135 N.W.2d 470 (1965). In this case, the employee, a dishwasher, developed contact dermatitis as a result of his employment. Although Ritter's employer argued that "dishpan hands" were a disease suffered by anyone who washed dishes, the court permitted recovery, stating that the disease did not have to be contained within a particular employment. Id. at 795, 135 N.W.2d at 472.  
113. NEB. REV. STAT. § 48-151(2) (Reissue 1978) defines an accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See also Sandel v. Packaging Co. of America, 211 Neb. 149, 156, 317 N.W.2d 910, 915 (1982).  
114. Gradwohl, "Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement," 43 NEB. L. REV. 27, 34 (1963) (suggesting that, on its face, the suddenly and violently language could be interpreted five different ways).
one suffered an accident. Courts today have recognized that not all work-related injuries can be so neatly classified. Wear and tear injuries do not happen suddenly, they are not unexpected nor are they peculiar to a particular trade. Rather, these conditions are ordinary and can affect anyone. Thus, the principal issue is whether wear and tear injuries are sufficiently work-related to be compensable.

Jurisdictions throughout the country have tended to recognize that wear and tear injuries are work-related and have permitted recovery under a number of theories. Nebraska first interpreted the suddenly and violently requirement in Hayes v. McMullen. In that case, the claimant operated a snow blade for the highway department. After plowing in the sun for twelve hours, he experienced vision difficulties. A physician diagnosed Hayes as suffering from snow-blindness. Because the condition did not manifest itself for several hours, there was a question as to whether it was an accident. Affirming the award of the Workers' Compensation Court, the Nebraska Supreme Court held that the requirement that an accident happen suddenly and violently did not mean instantaneously and with force.

In Brokaw v. Robinson, the court allowed the claimant recovery for a stroke. Although the court did not define suddenly

115. See Arnold, supra note 5, at 17-19.
116. The trend is toward recognition of gradually developed injuries as compensable. Id. But see Bowman v. National Graphics Corp., 55 Ohio St. 2d 222, --, 378 N.E.2d 1056, 1057-59 (1978) (recovery denied to a bookbinder who suffered severe back pains as the result of lifting heavy bundles).
118. Id. at 20.
119. Id. at 13.
120. 1B A. Larson, supra note 3, § 39.40, at 7-307. The theories permitting recovery by finding of an accident include: denying the validity of a definite time requirement; repeated impact or trauma; or occurrence of pain. Id.
121. 128 Neb. 432, 259 N.W. 165 (1935).
122. Id. at 433, 259 N.W. at 166.
123. Id. at 434, 259 N.W. at 166.
124. Id. at 435, 259 N.W. at 167.
125. Snow-blindness would have to continue for several hours before it would become known to the person exposed. Id. at 436, 259 N.W. at 167.
126. Id. The court faced a similar issue and factual situation in Yost v. City of Lincoln, 184 Neb. 263, 166 N.W.2d 595 (1969). In that case, the claimant was employed to operate a power saw. While cutting a piece of plywood, a patch of sawdust burst into his eye. Yost appeared fine when he went home, but later that evening, his eye began swelling and an infection developed. His eye was later removed. Recovery was permitted. Id. at 263-64, 166 N.W.2d at 596-97.
128. The day before he suffered the stroke, Brokaw had not only performed his usual chores of driving to pick up and load feed, he also had to drag several bulls through the mud to their pen. Id. at 760-61, 164 N.W.2d at 463.
and violently, it indicated that the finding of a single traumatic event as the cause of an injury was no longer necessary.\textsuperscript{129} Later, in \textit{Crosby v. American Stores},\textsuperscript{130} the court permitted recovery by using the repeated trauma doctrine.\textsuperscript{131} Crosby's job required her to strike boxes and pallets with her hands.\textsuperscript{132} She was diagnosed as suffering from carpal tunnel syndrome.\textsuperscript{133} The supreme court held that "the time of the accident [is] sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point."\textsuperscript{134}

The court's decision in \textit{Sandel} was the next logical step in the interpretation of the scope of the "suddenly and violently" requirement. It construed the requirement broadly to award compensation for what clearly was a work-related injury. Sandel's operation of the slitter scorer machine caused her to develop tennis elbow.\textsuperscript{135} She was not, however, required to carry the cost of her injury alone; the cost of the accident was shifted to the industry which caused it. If an injury requires an employee to stop work and see a physician, the "suddenly and violently" requirement is satisfied because the time of the injury is identified.\textsuperscript{136}

With this decision, the Nebraska Supreme Court upheld the primary purpose of worker's compensation—to compensate workers for work-related injuries.\textsuperscript{137} The court avoided a narrow construction of the "suddenly and violently" requirement that would deny recovery for virtually all wear and tear injuries, no matter how work-related they may be. At the same time, the court defined the requirement with sufficient precision to limit recovery to those situations where the causal connection between the injury and the job is clear.

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 763, 164 N.W.2d at 464.
  \item \textsuperscript{130} 207 Neb. 251, 298 N.W.2d 157 (1980).
  \item \textsuperscript{131} Note, \textit{Workmen's Compensation: Refining the Definition of Accident}, 15 CREIGHTON L. REV. 415, 417 (1981). Under this theory "each tiny bump, or scratch, or jar, or strain, or radiation, or irritation, or noise, or impact of a morsel of silica dust on the lungs is regarded as an accidental occurrence." 1B A. LARSON, \textit{supra} note 3, § 39.40, at 7-307 to 7-310.
  \item \textsuperscript{132} 207 Neb. at 252, 298 N.W.2d at 158.
  \item \textsuperscript{133} \textit{Id.} at 253, 298 N.W.2d at 158. Carpal tunnel syndrome is caused by repeated minor impacts, occurring over a period of time and which eventually develops into a disabling injury. Note, \textit{Workmen's Compensation: Refining the Definition of Accident}, 15 CREIGHTON L. REV. 415, 415 (1981).
  \item \textsuperscript{134} 207 Neb. at 254, 298 N.W.2d at 159.
  \item \textsuperscript{135} See notes 68-72 and accompanying text \textit{supra}.
  \item \textsuperscript{136} See notes 72-73 and accompanying text \textit{supra}.
  \item \textsuperscript{137} See notes 2 & 107 and accompanying text \textit{supra}.
\end{itemize}
Injuries Caused by the Elements and Acts of God

After a claimant has established that he is suffering from an occupational disease or has sustained an injury, he then must prove that the injury arose out of, and in the course of, his employment. 138 "Arising out of" is an ambiguous phrase that has been litigated frequently. 139 As a result, a number of tests have been developed to determine whether an injury arose out of employment. 140 A recurring problem with this phrase is how it applies to injuries caused by the elements.

The Nebraska Supreme Court first considered injuries caused by the elements in *Gale v. Krug Park Amusement Co.* 141 In that case, the worker was hired to paint building exteriors. While painting, he was killed by a storm. 142 His widow sought compensation, but recovery was denied on the ground that Gale's death did not arise out of his employment. 143 The court ruled that:

injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public is generally subjected. 144

Thus, with the *Gale* decision the court adopted the "increased risk" test 145 to determine whether injuries caused by the elements arose out of employment.

The court adhered to this test in *Crow v. Americana Crop Hail Pool, Inc.* 146 Crow was an independent insurance claims adjustor. 147 His employer sent him to Chappell, Nebraska to meet another agent. Enroute, a tornado blew Crow's car off the road and killed him. 148 Once again, recovery was denied because Crow was

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138. See note 110 and accompanying text supra.
139. See 1 A. Larson, *supra* note 3, § 6, at 3-1.
140. See note 49 and accompanying text supra.
141. 114 Neb. 432, 208 N.W. 739 (1926).
142. The employee realized the storm was approaching. While attempting to find shelter, the wind picked him up and blew him into a tree. *Id.* at 433-34, 208 N.W. at 740.
143. *Id.* at 436, 208 N.W. at 741.
144. *Id.* at 437, 208 N.W. at 741.
145. The court did not expressly refer to the increased risk test in its opinion, but this is the name given it by textbook authors. See 1 A. Larson, *supra* note 3, § 6.30, at 3-4.
146. 176 Neb. 260, 125 N.W.2d 691 (1964).
147. *Id.* at 261, 125 N.W.2d at 693.
148. *Id.* at 263, 125 N.W.2d at 693.
not exposed to a greater risk of injury than was the general public.\(^{149}\)

However, with the decisions in *Ingram v. Bradley*\(^{150}\) and *Mead v. Missouri Valley Grain Inc.*,\(^{151}\) it appeared that the Nebraska Supreme Court might have been less exacting\(^{152}\) in finding an extra element of risk. Larson notes that Nebraska has been quite exacting in finding that the employee was exposed to a greater risk than the public.\(^ {153}\) Other jurisdictions also were facing difficulties with the increased risk test. Courts have perceived these injuries to be sufficiently work-related to justify recovery by finding that the extra element of risk was satisfied by the presence of trees,\(^ {154}\) inferior building materials,\(^ {155}\) and the requirement of one's presence on the job.\(^ {156}\) A minority of leading jurisdictions realized that the increased risk test failed to provide relief for work-related injuries caused by the elements.\(^ {157}\) Instead, they adopted the "positional risk" test, which permits recovery if the employer requires the employee's presence in the place where the injury occurs, regardless of whether the public is also exposed to that risk.\(^ {158}\)

One of the first cases to adopt the positional risk test was the Louisiana decision in *Harvey v. Caddo De Soto Cotton Oil Co.*\(^ {159}\) In that case, Harvey was killed by a cyclone while working in the

\(^{149}\) *Id.* at 265-66, 125 N.W.2d at 694.

\(^{150}\) 183 Neb. 692, 163 N.W.2d 875 (1969).

\(^{151}\) 178 Neb. 553, 134 N.W.2d 243 (1965).

\(^{152}\) 1 A. *Larson*, *supra* note 3, § 8.21, at 3-25 to 3-26.

\(^{153}\) In *Ingram*, the extra element of risk was found in the employee's being forced to work inside a rickety ticket booth. 183 Neb. at 697, 163 N.W.2d at 878. *Mead* permitted recovery because the employee's job required his presence outside in subzero temperatures all day while the public remained safely indoors. 178 Neb. at 557-58, 134 N.W.2d at 247.

\(^{154}\) *Globe Indemnity Co. v. MacKendree*, 39 Ga. 58, 146 S.E. 46 (1928). There, the employee was traveling by car to transact business for his employer. While driving along the highway, a storm appeared and caused a tree to fall on MacKendree's car, killing him. *Id.* at —, 146 S.E. at 47.

\(^{155}\) *London Guarantee & Accident Co. v. Industrial Accident Comm'n*, 202 Cal. 239, 259 P. 1096 (1927). The employee, a janitor, was killed when an earthquake destroyed the building in which he was working. The court permitted recovery, finding that the employee was exposed to a greater risk than the public because his building was constructed of shoddy materials. *Id.* at —, 259 P. at 1097.

\(^{156}\) *Parrish Esso Serv. Center v. Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964). Adams was employed as a garage attendant. While performing his duties at 3:30 a.m., a wind storm snapped the wires controlling the station's electricity. Adams went out to check the wires and was injured when blown 75 feet. Recovery was allowed because the court found that Adams' risk was increased since his job required his presence outside while the public was safely at home. *Id.* at —, 374 S.W.2d at 472-73.

\(^{157}\) 1 A. *Larson*, *supra* note 3, § 6, at 3-1.


\(^{159}\) 199 La. 720, 6 So. 2d 747 (1942).
defendant's hull house.  Although the deceased was subjected to no greater risk of harm than was the general public, the court permitted recovery, noting that Harvey's death arose out of his employment because his job required his presence in the area where the cyclone hit. Similarly, in Whetro v. Awkerman, Michigan adopted the positional risk test. Employees met their deaths as a result of a tornado. The court employed the positional risk test, concluding that the increased risk test was inappropriate because it retained the tort concept that an employer should not be required to pay unless at fault. The Georgia Supreme Court recently overruled a line of cases embracing the increased risk test and adopted the positional risk test in National Fire Insurance Co. v. Edwards. Edwards was injured when part of his employer's building was hit by a tornado and collapsed. The court favored the positional risk test, finding it more equitable than the increased risk test, and thus joined the developing trend in this area.

By denying recovery in McGinn, the Nebraska Supreme Court reaffirmed its adherence to the increased risk test. Although consistent with earlier Nebraska cases, the decision seems unfortunate. McGinn's broken neck and resulting total disability were obviously work-related. As pointed out by Justice White in his dissent:

The claimant was in his automobile under a tree during a violent windstorm. The general public in the area, as the record showed, were sheltered inside their homes. In order to compare the claimant's exposure to that of the general public in the area, we must ask: What does an average person, free of the obligations of any particular

160. Id. at —, 6 So. 2d at 748.
161. Id. at —, 6 So. 2d at 751.
163. Two cases were combined. Whetro was killed when a tornado destroyed the building in which he was working. Emery was killed when a tornado destroyed the motel in which he was staying while on a business trip. Id. at —, 174 N.W.2d at 784.
164. Id. at —, 174 N.W.2d at 785-86.
166. Id. at —, 263 S.E.2d at 455.
167. Id. at —, 263 S.E.2d at 456.
168. See notes 141 & 146 and accompanying text supra.
169. The McGinn decision seems inconsistent with the Nebraska cases involving the street risk doctrine. See, e.g., Goodwin v. Omaha Printing Co., 131 Neb. 212, 213, 267 N.W. 419, 420 (1936) (permitting recovery where an employee was shot and killed by a hitchhiker); Good v. City of Omaha, 125 Neb. 307, 308, 250 N.W. 61, 62 (1933) (allowing recovery for injuries sustained by a municipal employee hit by a brick on a public street).
employment, do under the same weather conditions? I would expect that any sane person that is not required to be out in the storm would have enough sense to seek shelter or stay inside. The claimant's employment required that he be outside in the storm and this increased his exposure to the risk of being injured in the storm.\textsuperscript{170}

Instead of being compensated by worker's compensation, McGinn must bear the burden of his disability alone. It is ironic that the employer in this case was a public welfare agency, one whose very existence is premised on the notion that the cost of some personal calamities should be borne by the community at large.

The majority's use of the increased risk test effectively permitted the employer to successfully raise the act of God defense—a defense which is appropriate only in a negligence action, where fault is relevant. This defense has no place in a worker's compensation case.

\textit{The Standard of Proof}

The worker's compensation claimant has the burden of proving that he suffered an accident or has contracted an occupational disease that arose out of, and in the course of, his employment.\textsuperscript{171} The standard of proof to be met is a preponderance of the evidence.\textsuperscript{172} Although the Nebraska Supreme Court has stated that a probability will satisfy this standard and, alternatively, a mere possibility will not,\textsuperscript{173} the court has never expressly defined "preponderance of the evidence."\textsuperscript{174}

Studies demonstrate that jurors find the phrase "preponderance of the evidence" essentially meaningless.\textsuperscript{175} However, it is sufficient in Nebraska for the trial judge to simply instruct the jury that a claimant may recover if he has sustained his burden of proof by a "preponderance of the evidence," without defining that

\begin{itemize}
  \item \textsuperscript{170} 211 Neb. at 80, 317 N.W.2d at 769 (White, J., dissenting).
  \item \textsuperscript{171} 3 A. Larson, \textit{supra} note 3, § 80.33, at 15-433.
  \item \textsuperscript{172} \textit{E.g.}, Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 583, 254 N.W.2d 92, 95 (1977).
  \item \textsuperscript{173} \textit{E.g.}, Marion v. American Smelting & Refining Co., 192 Neb. 457, 460, 222 N.W.2d 366, 368 (1974).
  \item \textsuperscript{174} The Nebraska Supreme Court Committee on Pattern Jury Instructions has defined preponderance of the evidence as "that amount of evidence which on the whole ... produces the stronger impression ... and is more convincing of the existence of such fact when weighed against the evidence in opposition thereto." Neb. Sup. Ct. Comm. on Pattern Jury Instructions, \textit{Nebraska Jury Instructions} § 2.12, at 54 (1969). The committee acknowledged, however, that no Nebraska authority for its definition existed. \textit{Id.} § 2.12, at 56.
  \item \textsuperscript{175} R. Field, B. Kaplan & K. Clermont, \textit{Materials for a Basic Course in Civil Procedure} 503 (4th ed. 1978).
\end{itemize}
Other jurisdictions, recognizing that "preponderance of the evidence" is a term of art, have developed simple formulations to explain its meaning. In Kansas, for example, a claimant is deemed to have satisfied his burden when he demonstrates that the allegations in his petition are "more likely true than not true." Similarly, Illinois permits recovery when the claimant proves that his allegations are "more probably true than not."

The Nebraska Supreme Court concluded in *Husted* that the physician's testimony to the effect that Husted's neck injury was caused more likely than not by his work accident did not satisfy the preponderance of the evidence standard. Relying on its probability/possibility distinction, the court ruled that the physician's testimony lacked the "definiteness and certainty necessary" to support an award. The court's denial of recovery in *Husted* appears inconsistent with its previous decision in *Welke v. City of Ainsworth*. Welke, the defendant city's chief of police, was injured while attempting to make an arrest. He immediately experienced soreness in his neck, but it was not until a year later that he was informed by a specialist that he was suffering from a progressive neck injury. Three medical experts testified before the Workmen's Compensation Court. Two of the physicians testified that Welke's injury "could" have caused his disability. The third physician testified that the "injury and resultant disability was probably due" to the scuffle. It was upon this testimony that the Nebraska Supreme Court affirmed the award of compensation.

Notwithstanding the opposite results reached in the supreme court, the *Welke* and *Husted* cases appear to be "on all fours." First, Husted suffered from a progressive neck injury. Second, three of four medical experts were unable to testify that Husted's

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178. *E.g.*, Estate of Ragen, 79 Ill. App. 3d 8, —, 398 N.E.2d 198, 203 (1979) (holding that the proper standard of proof in an action to have an illegitimate child declared the alleged father's heir is "clear and convincing" evidence).
179. 210 Neb. at 114, 313 N.W.2d at 251.
180. *Id.*
181. 179 Neb. 496, 138 N.W.2d 808 (1965).
182. *Id.* at 497, 138 N.W.2d at 810.
183. *Id.* at 498-99, 138 N.W.2d at 810.
184. *Id.* at 501-02, 138 N.W.2d at 812.
185. *Id.* at 502, 138 N.W.2d at 812. The court noted that "[i]f a decision herein depended solely upon the testimony of Dr. Browne and Dr. Burney, it would have to be for the defendant. . . ." *Id.*
186. *Id.* at 502-05, 138 N.W.2d at 812-13.
187. 210 Neb. at 110, 313 N.W.2d at 249.
disability and his accident were causally connected. Finally, the Workmen's Compensation Court allowed recovery in *Husted* based on a fourth physician's testimony that it was "more likely" than not that Husted's disability was caused by his accident at work.

Thus, the only discernable difference between the *Welke* and *Husted* decisions seems to be the physicians' choice of words, although in both cases the experts seemed to be describing the same probability of causation. Husted was denied compensation, apparently because his expert made an unfortunate choice of words in replying to a question concerning causation. That is, instead of testifying that Husted's disability was "probably due" to his accident, the physician stated that the disability "more likely" was caused by the accident.

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188. *Id.* at 111-12, 313 N.W.2d at 250.

189. *Id.* Another issue is whether the supreme court invaded the province of the trier of fact. There was positive evidence that the disability was caused by the accident at work; there was no evidence of any other cause. By statute the supreme court must give factual findings of the Workmen's Compensation Court the same weight it would accord a civil jury verdict. *NEB. REV. STAT.* § 48-185 (Reissue 1978). The supreme court has stated the standard of review as follows:

In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong.


It is difficult to read *Husted* without concluding that the supreme court decided the factual issue independently of the Workmen's Compensation Court. As aptly stated by the Wisconsin Supreme Court: "The question is not whether there is credible evidence in the record to sustain a finding the commission didn't make, but whether there is any credible evidence to sustain the finding the commission did make." *Unruh v. Industrial Commission*, 8 Wis. 2d 394, —, 99 N.W.2d 182, 184 (1959).

190. For recovery of compensation to turn on such a fine distinction seems anomolous in view of the Nebraska Supreme Court's statement in an earlier worker's compensation case: "[R]easonable certainty and reasonable probability mean exactly the same thing when used in medical testimony." *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 460-61, 222 N.W.2d 366, 369 (1974).

Other jurisdictions have realized that determining precisely what constitutes a probability is a difficult linguistic problem. *E.g.*, *Martini v. Kapok Tree Inn*, 172 So. 2d 829, 832-33 (Fla. 1964) (holding that the phrases "quite likely" and "one could reasonably assume" were sufficient to sustain an award); *Davis v. Brezner*, 390 S.W.2d 525, 528 (Mo. Ct. App. 1964) (recovery allowed, based on expert testimony that there was "quite a likelihood" that the claimant's disability would persist indefinitely); *Wilkes-Barre City v. Workmen's Compensation Appeal Bd.*, — *Pa. Commw. —*, —, 420 A.2d 795, 797 (1980) (granting compensation based on physician's testimony that claimant's heart attack was "most likely" caused by his work); *Hallum v. Village of Omro*, 122 Wis. 237, —, 99 N.W. 1051, 1054 (1904) (concluding that the terms "probable," "liable" and "likely" were synonymous and related to reasonable probabilities, not mere possibilities). Moreover, as pointed out by Justice Hallows in *Unruh v. Industrial Comm'n*, 8 Wis. 2d 394, —, 99 N.W.2d 182, 186
If the claimant proves by a preponderance of the evidence that he is suffering from an occupational disease that arose out of, and in the course of, his employment, he is entitled to compensation. When more than one employer may have been responsible for exposing the worker to a hazardous substance, the seminal issue is which employer should pay the award. The court or legislature may choose to apportion liability among the various employers and insurance carriers, or it may utilize the last injurious exposure rule. This rule requires the last employer who exposed the employee to the hazard to pay the entire award.

The Nebraska Supreme Court was confronted with this choice in *Osteen v. A.C. & S., Inc.* Adopting the last injurious exposure rule, the court followed the trend of the majority of states. This rule is “particularly harmonious with the policy for liberal construction of the worker’s compensation” because the purpose of worker’s compensation is to “best serve the interests of employees who suffer from an occupational disease, rather than attempt an adjustment of their rights in the light of inequities that may exist” between successive employers.

An early case recognizing this principle is the Kentucky decision in *Gregory v. Peabody Coal Company.* Gregory, a miner,
worked for Peabody for thirty years before quitting. In September, 1958, he began working as a miner for Left Fork. After working only twenty-five shifts, Gregory was diagnosed as suffering from pneumoconiosis. The Review Board held Peabody Coal liable for the entire award, but the Kentucky Supreme Court reversed. Using the last injurious exposure rule, the court held Left Fork solely liable for the compensation, noting that the controlling factor in an occupational disease case is not when or where the disease began, but rather when it became disabling.

Federal courts also have adopted the last injurious exposure rule. In Travelers Insurance Co. v. Cardillo, the Second Circuit interpreted the Longshoremen's and Harbor Workers' Compensation Act to require the use of the last injurious exposure rule. The court ruled that the apportionment method should not be used because the history of exposure and the onset of the disease would be difficult to pinpoint. Apportionment would result in guesswork and would be "sheer folly."

In Underwriters at Lloyds, London v. Alaska Industrial Board, the court confronted an issue similar to that faced by the Nebraska Supreme Court in Osteen. While Osteen involved successive employers, Lloyds involved successive insurers. In Lloyds, the employee, Mattson, worked at a sanatorium where his duties consisted of bathing tubercular patients and making their beds. Hartford Accident & Indemnity Co. was the insurance carrier at that time. Eventually Mattson was transferred to the grounds where he worked as a gardener. Shortly after his trans-

201. Gregory stopped working for Peabody in March, 1958. Id. at 156.
202. Id.
203. Id.
204. Id. at 157.
205. The entire award was reversed on an appeal to an intermediate court. Gregory then appealed to the Kentucky Supreme Court. Id. at 158.
206. Id.
207. Id.
208. 225 F.2d 137 (2d Cir. 1955). That case combined three suits by employees suffering from occupational diseases. During the period of exposure, different insurance carriers were on risk. The court held the insurers liable for the compensation. Id. at 139-45.
210. 225 F.2d at 144.
211. Id.
213. Lloyd's contended that the compensation ought to be apportioned. However, the Alaska Workmen's Compensation Act was silent on the issue. Id. at 250.
214. Id. at 248-49.
215. Id. at 248.
fer, it was discovered that he was suffering from tuberculosis. Lloyd's was the carrier on risk at the time of the discovery and was held solely liable.

Although it can be argued that the rule might render certain persons unemployable, solutions to this problem exist. Moreover, the rule is not unfair to the last employer, because the claimant must demonstrate a causal connection between his disease and his last employment. Use of this rule supports the purposes of worker's compensation because it eases the burden on the worker, freeing the claimant from the burden of assigning or allocating responsibility for the disease. Since the development of an occupational disease is gradual, it would be especially difficult for the employee to prove which employment caused his disease, making recovery impossible.

Unless legislatures choose to enact apportionment on a pro rata basis, an employee would be required to undertake an expensive inquiry in order to determine which employer is liable. Unless there is a legislative formula for apportionment, judges would have to pinpoint precisely when the disease began and apportion liability accordingly. The result would be based on speculation and conjecture.

Thus the court's decision in Osteen, employing the last injurious exposure rule, construed the policies of worker's compensation liberally. With a minimum of difficulty, Osteen's family was compensated, removing the burden of proving which employer caused Osteen's work-related death. The result does not seem unfair to the defendant since the evidence clearly indicated that it

216. Id. at 249.
217. Id. at 251-52.
218. Oregon, as well as other states, has established a second injury fund to deal with successive injuries. This fund pays the last employer the difference between the total award and the amount directly attributable to the last injury. This system was designed to encourage employers to hire persons who had been injured previously. Note, Living With Oregon, supra note 61, at 138-39.
219. 4 A. Larson, supra note 3, § 95.21, at 17-86.
had last exposed Osteen\textsuperscript{227} to asbestos material. Use of the last injurious exposure rule upholds the principles of worker's compensation since the employee is compensated with a minimum of difficulty, litigation is reduced and industry absorbs and later distributes the cost of work-related injuries.

CONCLUSION

The central purpose of worker's compensation is to compensate workers for work-related injuries. Recovery for an injury that developed gradually was permitted in \textit{Sandel}. By allowing recovery and construing "suddenly and violently" as it did, the court ensured that the principles of worker's compensation would be upheld. The court refused to deny recovery because the technical requirement that an injury happen suddenly and violently was not literally satisfied.

However, the court's decision in \textit{McGinn} seems to defeat the policies of worker's compensation. By choosing to use the increased risk test to determine whether an injury arises out of employment, the court attached relevance to the tort concept of fault. Again, fault has no place in a worker's compensation case. McGinn's job required his presence in the area when the storm hit. He was injured as a result of the storm. His injury clearly arose out of his employment, regardless of the fact that his injury was caused by the elements.

Nor does the \textit{Husted} decision appear to uphold the compensation principle. While other jurisdictions recognize that the phrase "more likely than not" is an expression of probability, the Nebraska Supreme Court does not. Instead of attempting to ascertain what the witness meant when he used the words "more likely" in \textit{Husted}, the court apparently based its decision on the witness' unfortunate choice of words.

In \textit{Osteen}, however, the Nebraska Supreme Court supported the purposes of worker's compensation by choosing to use the last injurious exposure rule. The decision permits compensation for the injured worker and dispenses with a lengthy and expensive inquiry into the cause of the disease.

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\footnote{227. See note 98 and accompanying text \textit{supra}.}