# WORKERS' COMPENSATION

## CAN THE OCCUPATIONAL DISEASE PROVISIONS OF THE WORKERS' COMPENSATION ACT FAIRLY COMPENSATE VICTIMS OF OCCUPATIONAL DISEASE?

In *Ford v. Industrial Comm'n of Arizona*,[1] the Arizona Supreme Court addressed the occupational disease provisions of the Arizona Workers' Compensation Act.[2] The court held that where an occupational disease caused the claimant's injury, the claimant must proceed under the special provisions

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1. 145 Ariz. 509, 703 P.2d 453 (1985).

2. ARIZ. REV. STAT. ANN. §§ 23-901 to 23-1091 (1983 & Supp. 1985). The statute treats injury by accident separately from injury by occupational disease. § 23-901(12) defines these terms as follows:

> 'Personal injury by accident arising out of and in the course of employment' means any of the following:
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> (a) Personal injury by accident arising out of and in the course of employment.
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> * * *
>
> (c) An occupational disease which is due to causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and not the ordinary diseases to which the general public is exposed, and subject to the provisions of § 23-901.01.

ARIZ. REV. STAT. ANN. § 23-901.01 (1983) contains a list of six causal elements necessary to establish a claim for occupational disease compensation:

> The occupational diseases as defined by § 23-901, paragraph 12, subdivision (c) shall be deemed to arise out of employment only if all of the following six requirements exist:
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> 1. There is a direct causal connection between the conditions under which the work is performed and the occupational disease.
> 2. The disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment.
> 3. The disease can be fairly traced to the employment as the proximate cause.
> 4. The disease does not come from a hazard to which workmen would have been equally exposed outside of the employment.
> 5. The disease is incidental to the character of the business and not independent of the relation of employer and employee.
> 6. The disease after its contraction appears to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence, although it need not have been foreseen or expected.

In addition to § 23-901.01, several other sections of the Act apply only to occupational disease claims. § 23-901.02 (providing different rules for the liability of the last employer than those applicable in accident by injury cases); § 23-901.03 (appointing a committee of expert consultants on occupational disease "for the purpose of determining diagnosis, disablement, causal relation to the employment and the nature and type of medical treatment, hospitalization and other care required"); and § 23-901.04 (precluding compensation for occupational disease by reason of the employee's misconduct). In addition, where a noncompensable illness aggravates an occupational disease or vice versa, § 23-901.05 limits compensation to the "proportion only of the compensation that would be payable if the occupational disease where the sole cause of the disability or death, as such occupational disease as a causative factor bears to all causes of such disability or death."

Of the additional requirements that the workers' compensation scheme imposes upon the occupational disease claimant, the six causal requirements of § 23-901.01 are the most onerous.

The 1973 amendments to the Workers' Compensation Act incorporated coverage for occupational disease within the framework of the general workers' compensation provisions. *Ford*, 145 Ariz. at 513, 703 P.2d at 457 *citing* 1973 Ariz. Sess. Laws, Ch. 53, § 2. Prior to the amendments, a section separate from the general workers' compensation section provided for occupational disease disability benefits.

of the Act pertaining to occupational disease.[3] The claimant need not establish that the industrial exposure was the sole cause of the disability.[4] Further, the court held that the Arizona Constitution mandates benefits for occupational disease as well as for injury by work-related accident,[5] and that an Act of the legislature cannot reduce these benefits.[6]

This Casenote will examine the *Ford* decision in light of the increasing incidence of occupational disease and the current underutilization of the occupational disease compensation system. It will focus on the causes of this underutilization, including the difficulty of proving an occupational disease claim because of factors such as latency and multiple causation. It will also comment on the effect of *Ford* on the ability of the workers' compensation system to fairly compensate victims of occupational disease. By grounding occupational disease benefits in the constitution and recognizing that industrial exposure need not be the sole cause of disability, the supreme court has established a foundation upon which an equitable system of compensating victims of occupational disease may be built.

## CHARACTERIZATION OF THE CLAIM

Claimant Edward R. Ford began work in the Phelps Dodge New Cornelia mine in May of 1959. He worked primarily in the crushing operation, which continually exposed him to heavy concentrations of dust and other industrial irritants. During his 22 years of employment, Ford suffered from bronchial problems and coughing. In 1979, he experienced a sudden onset of fever accompanied by a dry, hacking cough. Ford received treatment at Phelps Dodge's New Cornelia hospital, where the treating physician diagnosed his ailment as an acute infection caused by a viral, bacterial, or fungal agent. Ford's cough never improved. The cough became so debilitating that Ford was forced to retire in March of 1981. At his disability hearing, Ford testified that at the time of his retirement he suffered from weakness, nervousness, coughing, chills, sweats and loss of breath following even minor exertion.[7]

Medical experts gave conflicting testimony at Ford's hearing. One pulmonary specialist testified that he could not reach a definite conclusion concerning the cause of Ford's condition. Another specialist testified that the work environment had, at the very least, significantly aggravated Ford's underlying condition. Ford's treating physician at the mine testified that there was no causal relationship between the work exposure and Ford's disability. The administrative law judge denied all compensation.[8]

In affirming the denial of compensation, the court of appeals held that

3. *Ford*, 145 Ariz. at 512, 703 P.2d at 456.

4. *Id.* at 518, 703 P.2d at 462. *See infra* note 22 and accompanying text.

5. ARIZ. CONST. art. 18, § 8 requires the legislature to "enact a Workmen's Compensation Law . . . by which compensation shall be required to be paid to any such workman [who is injured or killed] from any accident arising out of and in the course of [employment]".

6. *Ford*, 145 Ariz. at 517-18, 703 P.2d at 461-62. *See infra* notes 18 and 19 and accompanying text.

7. The facts of *Ford* are set forth at 145 Ariz. 511, 703 P.2d 455.

8. *Ford*, 145 Ariz. at 511, 703 P.2d at 455.

Ford could not seek relief under the general workers' compensation provisions of the Act.[9] Instead, he must establish his claim under the Act's occupational disease sections.[10] Furthermore, the court stated that the mere aggravation of a preexisting nonoccupational disease was not compensable under the occupational disease provisions.[11]

Ford appealed to the Arizona Supreme Court, arguing that an injured worker could elect to seek compensation under either the injury by accident or the occupational disease provisions of the Workers' Compensation Act.[12] This question of whether a claimant has a right of election is one which has troubled Arizona courts for over fifty years.[13] In answering the question, the supreme court adopted the reasoning of *Phoenix Pest Control v. Industrial Comm'n of Arizona*, where the appellate court held that a claimant does not have the right to make such an election.[14] Where the condition is a disease either party may require that the commission administer the claim pursuant to the occupational disease provisions of the Workers' Compensation Act.[15] Thus, claimant Ford's exclusive remedy was through the occupational disease provisions.[16]

## STANDARD OF PROOF FOR CAUSATION

In denying Ford's claim under the occupational disease provisions, the

9. Ford v. Industrial Comm'n of Arizona, 145 Ariz. 593, 703 P.2d 537 (Ct. App. 1984).

10. *Id.* at 595-96, 703 P.2d at 539-40.

11. *Id.* at 596, 703 P.2d at 540.

12. When the Arizona legislature first enacted a workers' compensation statute in 1913 (ARIZ. CODE § 3163-3179 (1913)), it provided compensation for injuries "by accident arising out of, and in the course of . . . employment. . . ." *Id.* at § 3164. This section would cover occupational disease injuries if they were "accidents" for purposes of the statute. There are two possible definitions for the word "accident." Under the first view, an accident is an unexpected event which *causes* an injury. *Ford*, 145 Ariz. at 512, 703 P.2d at 456. Under the alternate view, an accident is the unexpected *manifestation* of an injury. *Id.* Under the first definition, an occupational disease would not be compensable because occupational diseases are the result of continuous exposures over long periods of time rather than of single unexpected events. Under the second view, an occupational disease would be compensable because the injury itself—the manifestation of the disease—would be an unexpected event. *Id.*

Originally, Arizona courts adopted the first interpretation of "accident" and excluded compensation for occupational disease unless a specific event caused the disease. *Id.* In Pierce v. Phelps Dodge Corp., 42 Ariz. 436, 26 P.2d 1017 (1933), the Arizona Supreme Court held that "the word 'accident' refers to the cause of the injury and not to the injury itself." *Id.* at 445, 26 P.2d at 1021. Under the *Pierce* holding, claimants would receive compensation only where "an undesigned, sudden and unexpected *event* caused the injury" (emphasis added). *Id.* at 446, 26 P.2d at 1021. In 1944, after the legislature had enacted an occupational disease law, the court reversed the *Pierce* holding in *In re* Mitchell, 61 Ariz. 436, 150 P.2d 355 (1944). There, the court held that "there is nothing in our statutory law . . . that says that an industrial accident must be an instanteous [sic] happening." *Id.* at 451, 150 P.2d at 361. Thus the court allowed compensation where the worker's carbon tetrachloride poisoning was accidental because the manifested injury itself was "unexpected." *Id.* at 452, 150 P.2d at 362.

13. *Ford*, 145 Ariz. at 512, 703 P.2d at 456.

14. 134 Ariz. 215, 220, 655 P.2d 39, 44 (Ct. App. 1985).

15. *Id.* at 221, 655 P.2d at 45. The court of appeals noted that the statute expressly makes such claims subject to the provisions of § 23-901.01. The court adopted the reasoning of the respondent in the case, who argued that allowing an election by the claimant would render the occupational disease provisions a dead letter because "only the most blatant of malpractitioners" would exercise the option considering the more stringent proof requirements contained in § 23-901.01. *Id.* at 220-21, 655 P.2d at 44-45.

16. *Ford*, 145 Ariz. at 512, 703 P.2d at 456.

court of appeals contended that mere aggravation of a preexisting nonoccupational disease was not compensable.[17] The Arizona Supreme Court examined this holding from the perspective of article XVIII, § 8 of the Arizona Constitution. This provision requires the legislature to enact a workers' compensation law to compensate workers injured by accidents arising out of and in the course of employment whether that injury was caused in whole, in part or contributed to by a danger of employment.[18] The supreme court held that an occupational disease is in fact an accident arising out of and in the course of employment and that article XVIII, § 8 of the constitution therefore requires compensation for occupational disease just as it requires compensation for injuries caused by sudden accidents.[19]

Ford contended that the court of appeals' holding that mere aggravation was not compensable resulted in a requirement that work conditions must be the sole cause of a compensable disease.[20] He claimed that this was unconstitutional given the constitution's mandate that Arizona's system provide compensation for any disability that employment either contributes to, or wholly or partially causes.[21] The supreme court agreed and held that an occupational disease claimant need not prove that the industrial exposure was the sole or exclusive cause of his disease and consequent disability.[22]

In so holding, the court construed[23] the six conjunctive requirements of A.R.S. § 23-901.01[24] as tests distinguishing diseases associated with the workplace from those resulting from nonoccupational exposures.[25] While the fact finder must consider each of the six requirements to ensure that the disease is one related to employment, the fact finder cannot deny compensation on the ground that the claimant's employment is not the disease's sole cause.[26]

The supreme court nevertheless upheld the denial of compensation to Ford because it found that his employment triggered symptoms of a nonoccupational condition without aggravating the condition itself.[27] Under the court's approach, the employment environment must aggravate the claimant's underlying condition rather than merely the symptoms of a nonoccupational condition before the disability is compensable.[28] Ford's symptom was

17. *Ford*, 145 Ariz. at 596, 703 P.2d at 540.

18. *Ford*, 145 Ariz. at 515, 703 P.2d at 459. ARIZ. CONST. art. XVIII, § 8 states:

> The Legislature shall enact a Workmen's Compensation Law . . . by which compensation shall be required to be paid . . . in the case of . . . injury [or] death . . . if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment.

19. *Ford*, 145 Ariz. at 517, 703 P.2d at 461.

20. *Id.* at 515, 703 P.2d at 459.

21. *Id. See supra* note 15 and accompanying text.

22. *Id.* at 518, 703 P.2d at 462.

23. The court stated: "[C]onstruction of the (statute) must be governed by the constitutional provision." *Id.* at 517, 703 P.2d at 461 (citing *In re* Mitchell, 61 Ariz. at 451, 150 P.2d at 361 (1944)).

24. *See supra* note 2 for these requirements.

25. *Ford*, 145 Ariz. at 518, 703 P.2d at 462.

26. *Id.*

27. *Id.* at 519, 703 P.2d at 463.

28. *Id.*

a cough.[29] The physical impact of coughing led to his disability.[30] The court was willing to distinguish between the symptom and the condition in this situation.[31] However, there is a fine line between the aggravation of a symptom and the aggravation of an underlying condition, and this distinction may be impossible to draw in certain cases.

## THE CHANGING NATURE OF INJURIES IN THE WORKPLACE AND THE ABILITY OF ARIZONA'S OCCUPATIONAL DISEASE LAW TO DEAL WITH THESE CHANGES

The *Ford* decision appears at a time when the nature of the work environment is changing.[32] Traditional industrial accidents (i.e. where a worker loses a hand in an ore crusher), may become less prevalent as the incidence of occupational diseases (i.e. where long-term exposure to toxic chemicals disables a worker) increases.[33] Will the occupational disease provisions of Arizona's Workers' Compensation Act, as the *Ford* court construed them, be able to deal with this evolution and fairly compensate injured workers?

The tension between competing policy goals hampers the ability of the system to compensate victims of occupational disease.[34] The goal of compensating all employees injured by work-place hazards may at times be difficult to reconcile with the goal of restricting payments of benefits to those workers whose disabilities are causally related to employment.[35] Traditional industrial accidents are dramatic, insular events for which a clear and immediate relationship exists between the on-the-job event and the injury.[36] The rub is that the system developed to deal with such accidents may not be able to deal effectively with cases involving occupational disease, where the evidence connecting the illness to the workplace is often more tenuous.[37]

Section 23-901.01 is an example of the difficulty employees attempting to establish occupational disease claims face in such a system. Occupational disease claims are, by their very nature, more difficult to establish than

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29. *Id.* at 511, 703 P.2d at 455.

30. The court stated: "Claimant became so debilitated as a result of the cough that he was forced to retire." *Id.*

31. *Id.* at 519, 703 P.2d at 463.

32. *See* Cain, *No cure seen for occupational disease worries*, BUS. INS., Jan. 14, 1985, at 12, where the author states: "[E]very worker is a potential victim of the newer occupational diseases—the 'high-tech illnesses' being generated by the nation's growing service and information industries."

33. *Id.* at 13.

34. *See* Dunlap v. Industrial Comm'n of Arizona, 90 Ariz. 3, 6, 363 P.2d 600, 602 (1961). The competing interests are set forth by the *Dunlap* court:

> The Workmen's Compensation Act is remedial and its terms should be liberally construed in order to effectively carry out the purpose for which it was intended, that being to place the burden of injury and death from industrial causes upon industry. Nonetheless, the Act does not contemplate a general health and accident fund; hence there must be a causal connection between the employment and the injury. (citations omitted).

*Id.*

35. *Id.*

36. Amicus Curiae Brief for the Southern Arizona Workers' Compensation Association at 11, Ford v. Industrial Comm'n of Arizona, 145 Ariz. 509, 703 P.2d 453 (1985).

37. *See* P. BARTH & H. HUNT, Workers' Compensation and Work-Related Illnesses 61-62 (1980), ("Occupational disease cases are far more likely to involve complex, if not fundamentally insoluble, questions of causation").

claims involving industrial accidents.[38] Paradoxically, § 23-901.01's six conjunctive requirements establish a higher burden of proof for occupational disease claims than corresponding statutes establish for accidental injury claims.[39] In enacting these six requirements, the legislature sought to save employers from paying claims that were not causally related to the workplace.[40] The dilemma this causes is that the heightened proof requirement makes it more likely that many workers whose illnesses work exposure in fact causes will not receive compensation because they will be unable to provide the proof that § 23-901.01 requires.

Because problems abound in the area of occupational disease data recordation,[41] there are no exact figures concerning either the number of workers occupational disease affects or the number of affected workers who do not receive compensation.[42] However estimates do exist. One federal study estimates that almost two million workers reported that they were severely or partially disabled from an occupationally-related disease.[43] Approximately 700,000 of these occupational disease victims suffer long-term total disability.[44]

Very few of these disabled workers receive compensation through the workers' compensation system. In fact less than three percent of all workers' compensation cases involved claims for occupational diseases.[45] In Ari-

38. *See supra* notes 45-69 and accompanying text.

39. *See supra* note 2.

40. 1 B. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.81 (1985), where the author states:

> The original reason for these restrictions [such as those contained in ARIZ. REV. STAT. ANN. §§ 23-901.01 to 23-901.05] was the fear that the compensation system could not bear the financial impact of full liability for dust diseases [the original occupational diseases, *see* P. BARTH & H. HUNT, *supra* note 37 at 3] simply because they were so widespread in particular industries. [T]hese makeshifts, contrived to tide employers and carriers over a transitional difficulty, remained ingrained in compensation acts long after their reason for existence had diminished or disappeared.

41. STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 98TH CONG., 2D SESS., OCCUPATIONAL ILLNESS DATA COLLECTION: FRAGMENTED, UNRELIABLE AND SEVENTY YEARS BEHIND COMMUNICABLE DISEASE SURVEILLANCE 2 (1980).

> Numerous factors make difficult the detection and reporting of occupational disease. Many diseases are latent, sometimes not manifesting themselves until well over 20 years after exposure. During this time, employees may have switched jobs several times or retired, making it difficult to understand the occupational nature of the disease. Sometimes, as well, employees can be exposed to more than one substance. In addition, different employees may have varying susceptibility to hazardous substances. Finally, employee, employer and physician unawareness limit the ability to detect fully occupational disease. In particular, physician training and ability to diagnose occupational disease are notably weak. (footnote omitted).

42. P. BARTH & H. HUNT, *supra* note 37, at 271.

43. ARNOLD PACKER, ASSISTANT SECRETARY FOR POLICY, EVALUATION & RESEARCH, U.S. DEP'T OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASE 2 (1980).

44. *Id.*

45. *Id.* at 68. "The major sources of income support for those severely disabled from an occupational disease are: social security (53 percent), pensions (21 percent), veterans benefits (17 percent), welfare (16 precent), workers' compensation (5 percent) and private insurance (1 percent)." *Id.* at 2. These public and private income sources replace about 40 percent of the wages lost by a worker severely disabled by occupational disease, compared with a replacement rate of 60 percent for those injured by accidental injury. Workers' compensation provides the major source of replacement income support for the accidental injury victims. *Id.*

The 1980 Department of Labor report suggests that Social Security is not a salutary remedy for

zona, this figure is further reduced to two percent.[46]

Several factors help to explain the apparent underutilization of the system to compensate victims of occupational disease. As previously noted, the proof-of-causation requirement of the Arizona statute are difficult for occupational disease claimants to meet.[47] The latency period of some occupational diseases further complicates these claims.[48] The exceedingly litigious nature of these cases, as compared with traditional accidental injury cases, may also discourage some claimants.[49]

The Arizona statute requires a worker seeking compensation for an occupational disease to prove both that his disability arose out of, and in the course of employment and that it meets the six conjunctive causal requirements of § 23-901.01.[50] However, because the causes of many diseases are unknown,[51] and because almost any disease contracted at work could also develop as a consequence of some events entirely removed from the workplace,[52] such proof may be impossible to provide. Moreover, the claimant cannot meet his burden of showing that workplace exposure caused his disability by demonstrating an increased incidence of the disease among those who share his working conditions.[53]

In addition, many diseases do not result from a single agent.[54] They are

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the worker disabled from occupational disease because more than half of the occupational disease victims are found ineligible to receive Social Security benefits. *Id.* at 80.

46. THE INDUSTRIAL COMM'N OF ARIZONA, CHARACTERISTICS OF WORK INJURIES AND ILLNESSES IN ARIZONA— 1984 at 3.

47. *See supra* note 2.

48. *See infra* note 57 and accompanying text.

49. *See infra* notes 67-70 and accompanying text.

50. *See supra* note 2.

51. Barth, *A Proposal for Dealing with the Compensation of Occupational Diseases*, 13 J. OF LEGAL STUD. 569, 572 (1984).

52. P. BARTH & H. HUNT, *supra* note 37, at 10.

53. *See* Locke, *Adapting Workers' Compensation to the Special Problem of Occupational Disease*, 9 HARV. ENVTL. L. REV. 249, 278 (1985), where the author states:

> [T]he general view holds that proof of excess incidence is not proof that the particular claimant's disease was 'within the excess'—that the disease was caused by exposure to the toxin. Proof of causation in fact is still required, and thus depends on expert medical testimony. Mere increased mathematical likelihood is not proof of the probability of medical causation. (footnotes omitted).

*Id.*

Valley fever, a fungal disease prevalent in the Southwest, provides a classic example of how increased incidence without specific causal proof results in a noncompensable claim. In Crawford v. Industrial Comm'n of Arizona, 23 Ariz. App. 578, 534 P.2d 1077 (Ct. App. 1975), meningitis associated with valley fever disabled a rock crusher. The court heard expert medical testimony that while

> [w]e really don't know where somebody acquires valley fever or how he acquires Valley Fever or why one person acquires it and another person does not . . . it's been shown that statistically those people who work in the outdoors, those people who work in dusty environments, have a greater incidence of acquiring valley fever.

*Id.* at 580, 534 P.2d at 1079. The court held that the "doctor's testimony that the working conditions statistically increased the probability of contracting the disease does not rise to the standard of 'reasonable medical certainty' " necessary to link the infection to the claimant's work. *Id.* at 583, 534 P.2d at 1082. The court went on to say that "[i]t is simply not possible to prove that a workman who works out of doors in Arizona, whether in normal or abnormal dusty conditions, contracts valley fever as a result of his work, as opposed to any other time he is exposed to this endemic disease at home, at play, or anywhere else." *Id.* at 584, 534 P.2d at 1083.

54. P. BARTH & H. HUNT, *supra* note 37, at 12, quoting Sagan, *Radiobiological Problems Associated with Adjudication of Workmen's Compensation Claims*, 11 J. OCCUPATIONAL MED. 338 (1969), stating:

often the result of many factors working synergistically.[55] Arizona's occupational disease law requires apportionment in cases of multiple causation.[56] Here, again, proof of causation is problematic.

Another factor contributing to both the underutilization of the system and to the under compensation of the victims is the latency inherent in many occupational diseases.[57] In these diseases, a lengthy period may separate the exposure to the disease-causing agent from the manifestation of the disease's symptoms.[58] In the case of mesothelioma, a cancer that asbestos causes, a very limited exposure to asbestos may lead to the onset of cancer in twenty or thirty years.[59] This latency period contributes to the proof problems because the claimant may not remember what chemicals she came into contact with twenty or thirty years earlier or who her employer was at that time. Other workers, who would be helpful witnesses, may no longer be available or may also have difficulty remembering facts important to proving the causal link between exposure and disability. Also, the more time that has elapsed since the exposure, the less likely it is that the employee or her physician will connect the illness to a work-related disease. The symptoms of many occupational diseases are indistinguishable from those of common nonoccupational illnesses. Unless the physician suspects the workplace, she may assume that it is the more common sickness.[60]

In the workers' compensation area, there is an oft-cited quid-pro-quo whereby the worker exchanges the common law right to pursue a tort action against the employer in the event of injury for the certainty of compensation with little delay.[61] In occupational disease cases, the promised benefits of this trade off are unrealized.[62] Occupational disease claimants face a far more litigious and lengthy process than the traditional accidental injury claimants encounter.[63] According to a 1975 study, employers controverted

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Chronic disease among humans is almost certainly not the end-result of a single etiologic agent, but, rather, reflects the genetic and physiologic constitution and life experience of the individual. To evaluate the role of any one factor (such as occupational radiation exposure) to subsequent disease is to ignore the multiplicity of intertwined, still vaguely understood factors which operate to produce disease.

55. *See* P. BARTH & H. HUNT, *supra* note 37, at 12, where the authors state:

It is evident that little is yet known about such interactions, with many other probable causes still obscure; these may include physiological factors associated with age and nutrition. It may turn out that much occupational disease would not occur except with interaction of two or more agents including those in the work environment and those inherent in the individual.

*Id.* quoting Selikoff, *Multiple Factor Interactions in Occupational Disease* (paper presented at the Conference on Occupational Diseases and Workers' Compensation, Chicago, IL, Feb. 10-12, 1976).

56. ARIZ. REV. STAT. ANN. § 23-901.05 (1982). *See supra* note 2.

57. P. BARTH & H. HUNT, *supra* note 37, at 62-70.

58. *Id.* at 62.

59. Barth, *supra* note 51, at 575. For cancer in general, the average latency period is about 20 years. ARMENIEN & LILIENFELD, *The Distribution of Incubation Periods of Neoplastic Diseases*, 99 AM. J. EPIDEMIOLOGY 92 (1974).

60. *See generally* P. BARTH & H. HUNT, *supra* note 37, at 63, 68 and 86-87; Locke *supra* note 53, at 262 and 267.

61. P. BARTH & H. HUNT, *supra* note 37, at 61.

62. *Id.*

63. *See* Barth, *supra* note 51, at 571 where the author states:

Serious occupational disease cases tend to be settled or decided only after prolonged contention. Disabled workers or their survivors regularly must endure two or three years of controversy before any compensation is received. In both complexity and duration, com-

62.7 percent of all compensated occupational disease claims in comparison with less than ten percent of all compensated accidental injury claims.[64]

In the traditional accidental injury case, there is little likelihood of litigation because causation is clear.[65] In an occupational disease case, however, the uncertainty of causation invites litigation.[66] Lawyers may refuse to take these cases, however, because statutes limit recoveries in the workers' compensation area and because occupational disease claims are so difficult to prove.[67]

## IMPLICATIONS FOR PRACTITIONERS

By embracing the *Phoenix Pest Control* holding that either party can elect to have an occupational disease claim considered under the sections pertaining to occupational disease,[68] the *Ford* court invites defendants to invoke these sections to take advantage of their more stringent proof requirements.[69] However, a question remains concerning cases where an accidental injury occurs in the context of occupational disease. For example, an employee may suddenly injure his back when he lifts a heavy object at work, but the conditions of employment may have contributed to an underlying back disease before the specific injury occurred.[70] Can the claimant proceed under the accident provisions? Which party has the burden of proving whether the disability resulted from accidental injury or disease when its cause is in dispute?[71] The *Ford* decision leaves these questions unanswered. Arizona cases, however, offer some grounds for speculation.

Arizona has allowed compensation for accidental injuries within the context of occupational disease.[72] These cases are consistent with the hold-

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pensation proceedings are not strikingly different from tort actions, and the transaction costs of the 'no-fault' workers' compensation system approach the very high costs incurred in tort actions. (footnote omitted).

64. P. BARTH & H. HUNT, *supra* note 37, at 163, table 5.16. Seventy-two percent of controverted occupational disease cases were contested on the issue of compensability. Only 2 percent of the accident cases were contested on this issue. *Id.* at 164.

65. *Id.* at 62.

66. Locke, *supra* note 53, at 259.

67. *Id.* at 260. "The typical permanently and totally disabled occupational disease claimant in the late 1970's received $9,676 in total compensation. The equivalently disabled accident claimant received $23,352. The mean total compensation for the beneficiaries of occupationally diseased workers who died was $3,511. The corresponding figure in accident cases was $57,474." *Id.* at 259 citing P. BARTH & H. HUNT, WORKERS' COMPENSATION AND WORK-RELATED ILLNESSES, 174, table 5.31 (1980).

68. *Ford*, 145 Ariz. at 514, 703 P.2d at 458.

69. *See supra* note 2.

70. If the claim is considered under the traditional workers' compensation provisions ("personal injury by accident arising out of, and in the course of employment." ARIZ. REV. STAT. ANN. § 23-901(12)(a)), compensation would be more likely because the injury obviously occurred "in the course of employment." But if the claim were subject to the occupational disease provisions of the act, the stiffer proof requirements of § 29-901.01 would make compensation less likely.

71. *See Phoenix Pest Control*, 134 Ariz. at 218, 655 P.2d at 42 (Ct. App. 1982) where the court states: "[W]hether a given condition constitutes an occupational disease might be very difficult to resolve under some factual circumstances . . . ."

72. *See e.g.*, Marquez v. Industrial Comm'n of Arizona, 110 Ariz. 273, 517 P.2d 1269 (1974). In this case, a miner suffered a weakened heart as the result of a long-standing fibrotic condition. Although silicosis caused the condition, the miner could not pursue his claim under the occupational disease provisions because of a then existing statutory requirement that a claimant work 1200 shifts before receiving compensation for silicosis. (ARIZ. REV. STAT. ANN. § 23-1107 (repealed 1973))

ing in *Ford* that claimants must pursue an occupational disease claim under the special statutes pertaining to occupational disease.[73] The *Ford* holding does not require claimants to pursue claims involving sudden, traumatic events associated with occupational diseases under the occupational disease provisions. Thus, it appears that an election is still possible where an accidental injury occurs in conjunction with an occupational disease.

Arizona case law provides an answer to the question of which party has the burden of proving whether an accident or an occupational disease caused the injury. The rule in workers' compensation is that the claimant has the burden of proof as to all elements of the claim.[74]

## CONCLUSION

The current workers' compensation system may be fundamentally incapable of fairly compensating victims of occupational disease.[75] The inherent nature of occupational disease places it outside the realm of injuries that the system evolved to handle. This is one reason for the underutilization of the workers' compensation system by victims of occupational disease. The difficulties of proving a disease's causal connection to the workplace, the latency element, and the contentious nature of occupational disease claims also indicate that a system designed for compensating victims of accidental injuries arising out of, and in the course of employment simply may not be able to accommodate the more complex problems stemming from occupational diseases.

However, Arizona has not had much experience with occupational disease claims.[76] As the case law develops, it is possible that victims may receive fair compensation under the statute. The rigorousness with which the supreme court construes the causation requirements of A.R.S. § 23-901.01 in future decisions will have an important impact upon the fairness of this compensation.

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*Marquez* at 274, 517 P.2d at 1270. He received compensation under the traditional workers' compensation accident provisions because "each impact or inhalation of silicon dust [was treated] as a miniature accident in itself leading to the ultimate disability." *Marquez* at 275, 517 P.2d at 1271.

73. *Ford*, 145 Ariz. at 514, 703 P.2d at 458.

74. *See* Western Bonded Products v. Industrial Comm'n of Arizona, 132 Ariz. 526, 527, 647 P.2d 657, 658 (Ct. App. 1984). *See also* Yates v. Industrial Comm'n of Arizona, 116 Ariz. 125, 568 P.2d 432 (Ct. App. 1977), Lamb v. Industrial Comm'n of Arizona, 27 Ariz. App. 699, 558 P.2d 727 (1976).

75. Barth, *supra* note 51, at 571.

76. *See supra* note 46 and accompanying text.