

Cawley, Donald, Dec'd

INJURY (RCW 51.08.100)

"Traumatic nature"

A worker's aspiration of a piece of steak during a business lunch is a "sudden and tangible happening, of a traumatic nature...occurring from without," and meets the statutory definition of an injury. No showing of external physical violence is necessary for an incident to qualify as "traumatic." ...*In re Donald Cawley, Dec'd, BIIA Dec., 41,864 (1974)* [dissent]

Scroll down for order.

1 "'Injury' means a sudden and tangible happening, of a traumatic nature,
2 producing an immediate or prompt result, and occurring from without,
3 and such physical conditions as result therefrom."
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5 The hearing examiner upheld the Department's rejection of this claim on the basis of Flynn v.
6 Department of Labor & Industries, 188 Wash. 346 (1936)--a case which he deemed to be directly in
7 point and therefore controlling herein, particularly because that case found no occurrence "from
8 without" as required by that phrase in the statutory definition of injury. We cannot agree that the
9 Flynn case controls.
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11 It is to be noted that the only pathological condition presented in Flynn involved the heart.
12 Accordingly, the case falls within a unique class. Historically, heart cases have been governed by
13 special rules in this jurisdiction, insofar as meeting the requirements of the term "injury" under our
14 Act. Prior to Windust v. Department of Labor & Industries, 52 Wn.2d 33 (1958), a heart attack
15 which resulted from routine work exertion was compensable as an "injury". As stated in McCormick
16 Lumber Company v. Department of Labor & Industries, 7 Wn.2d 40 (1941), a heart case:
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18 "An accident arises out of the employment when the required exertion
19 producing the accident is too great for the man undertaking the work,
20 whatever the degree of exertion or the condition of the workman's
21 health." (Emphasis, the courts.)
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23 Windust, supra, expressly overruled McCormick, supra, and the rule has since prevailed that the
24 work exertion precipitating the heart attack must be "unusual" in order for the heart attack to qualify
25 as an "injury". Over the years, however, regardless of which rule applied, it has always been the
26 law that such exertion had to grow out of the workman's employment. In other words, it has been
27 the uniform rule in heart cases that the exertion precipitating the heart attack-- be it usual or
28 unusual--had to "arise out of" the workman's employment.
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30 In Flynn, the workman suffered a coughing seizure which placed an undue and fatal strain on
31 his heart. The strain or exertion on the heart (coughing), however, did not arise out of the
32 workman's employment. Rather it resulted from the work-man accidentally swallowing tobacco he
33 was chewing. The chewing of tobacco and the swallowing thereof was a risk strictly personal to the
34 workman, having no relationship to the work whatsoever. Had the workman suffered his coughing
35 seizure as a result of the inhalation of fumes, dust, smoke, or the like, from the job, a different result
36 would have undoubtedly obtained. See, e.g., Barrett v. Department of Labor & Industries, 52
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1 Wn.2d 439. Thus, the Flynn result accords with the general rule of heart cases to the effect that the
2 precipitating exertion or strain must have arisen out of the employment.
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4 The Flynn case, however, was decided in 1936, which was prior to the time that any special
5 rule governing heart attack cases had been clearly and definitively stated by the court. Accordingly,
6 the court neither approached nor resolved Flynn as a "heart" case, but rather measured the factual
7 circumstances against the backdrop of the statutory definition of "injury", the same as any other
8 accident not involving the heart. That statutory definition, as previously noted, reads as follows:
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11 "Injury' means a sudden and tangible happening, of a traumatic nature,
12 producing an immediate pr prompt result, and occurring from without,
13 and such physical conditions as result therefrom." RCW 51.08.100
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15 The court noted that under the statute there must be a "happening" which was both "of a traumatic
16 nature" and "occurring from without". It took the position that the only "happening" that "occurred
17 from without" was that the workman took a quick gulp of air when he called out to a fellow-
18 workman. As to this, the court held:
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21 ". . . air only entered, and air entering through natural passages and in a
22 natural way cannot be a 'happening of a traumatic nature'.
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24 Thus, the court seemed to be saying that the "happening" and "occurring from without" must take
25 the form of external physical violence in order to qualify as being traumatic. In other words, it was
26 the "traumatic nature" which was missing. If so, this supposed requirement has long since been
27 abandoned. As stated in the later case of Petersen v. Department of Labor & Industries, 40 Wn.2d
28 635 (1952), with reference to the statutory definition of injury:
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31 ". . . our decisions . . . unmistakably dispense with the showing of an
32 external physical violence." (Emphasis supplied.)
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35 Unlike Flynn, the case now before us is not a "heart" case, but one of asphyxiation resulting from
36 the workman choking on a piece of steak he was eating during a business lunch. Accordingly, the
37 law governing what may be termed "non-heart" cases applies. In this regard, it is to be noted that
38 under our statute an injury, to be compensable, need not "arise out of" employment. It is sufficient
39 if the injury occurs "in the course of" employment. See Tilly v. Department of Labor & Industries, 52
40 Wn.2d 148; RCW 51.32.010.
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42 Perhaps this distinction is best pointed up by the Utah case of Tavey v. Industrial
43 Commission of Utah, 150 P.2d 379, wherein the court stated:
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1 " . . . Our statute does not require that an injury, to be compensable,
2 must both arise out of and occur in the course of employment. In its
3 present form, it is more liberal toward the workman than the com-
4 pensation statutes of most of the states or the original compensation
5 statute of England from which these were derived. . . . Under this [Utah]
6 statute an injury may be compensable if caused by accident occurring in
7 the course of employment, regardless of whether it grows out of any
8 special hazard connected with the employment." (Emphasis supplied.)
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10 This language is also appropriate to the Washington statute.

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12 It is undisputed that the workman was in the course of his employment while eating his lunch
13 in this case. Thus, if the choking incident qualifies as an "injury", the resulting death must be held
14 compensable.
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16 As previously noted, whatever may have been the state of the law regarding "traumatic
17 happening" at the time of Flynn, supra, it has long since been the rule that no showing of external
18 physical violence is necessary for an incident to qualify as "traumatic" under the definition of
19 "injury". Petersen v. Department of Labor & Industries, supra, and cases cited therein.
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22 Here, the workman died of asphyxia--that was the only pathological cause of death. This
23 resulted from the intake of a foreign body (a piece of steak) which, instead of traveling the normal
24 course down the esophagus into the digestive system, accidentally lodged in the trachea, thereby
25 cutting off the workman's life-sustaining oxygen. Certainly, this constituted a very "sudden and
26 tangible happening", and the intake of the piece of steak certainly "occurred from without". The
27 lodging thereof in the trachea with resulting fatal asphyxia was clearly "traumatic" under the normal
28 under- standing of what word.
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32 As persuasive authority from other jurisdictions, petitioner has cited two cases which we
33 deem to be especially relevant. In the first, Pickett v. Pacific Mutual Life Insur- ance Company, 22
34 A. 811, the Supreme Court of Pennsylvania held that asphyxiation due to gas inhalation constituted
35 an "external, violent and accidental" injury within the decedent's insurance policy. It seems to us
36 the work "external" is equivalent to the phrase "occurring from without" and the word "violent" would
37 equate with the word "traumatic". More specifically, the court stated in Pickett:
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41 "Was the death of the intestate caused by or through 'external, violent,
42 and accidental means', within the language of the policy? . . . We should
43 say that death was due to external and violent means as clearly as
44 drowning. . . . The cause of death came from outside as surely as would
45 a rifle ball, or water in the case of drowning. The escape of gas into the
46 room was violent in the same sense that would be the flow of water into
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1 a wrecked vessel. In either case, the external means constitute the
2 cause which produces death. It is a violent death, produced by an
3 external power, not natural."
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5 The second case, Snyder v. General Paper Company, 152 N.W.2d 743 (1967), a Minnesota case,
6 is factually on all fours with the instant case. There, a salesman choked on a piece of meat and
7 died of asphyxia while entertaining a prospective customer at dinner. The issue on appeal was not
8 whether or not the asphyxiation from choking on a piece of meat constituted an injury, but whether
9 or not the admitted injury was allowable under the Minnesota statute which requires an injury to be
10 one "arising out of and in the course of employment." In a six-three decision, the Supreme Court of
11 Minnesota held the injury compensable as "arising out of" as well as being "in the course of" the
12 decedent's employment.
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14 Thus, even under a statute with a more restrictive coverage requirement than our own, the
15 instant case would be allowable.
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17 In conclusion, we hold that the decedent herein sustained an "injury" within the meaning of
18 RCW 51.08.100, while in the course of his employment, thereby entitling his widow to a pension
19 and other benefits as provided by law.
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21 **FINDINGS OF FACT**

22 Based upon the record, the Board makes the following findings:
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- 24 1. On November 2, 1972, the widow-petitioner, Wanita Cawley, filed a
25 claim with the Department of Labor and Industries for benefits for widow
26 and children, based upon the death of her husband, Donald V. Cawley,
27 on September 20, 1972. On November 6, 1972, the Department issued
28 an order rejecting the claim. On December 13, 1972, the widow-
29 petitioner filed a notice of appeal, and on January 3, 1973, this Board
30 issued an order granting the appeal.
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- 32 2. Appellate proceedings were conducted before the Board of Industrial
33 Insurance Appeals, and on April 12, 1973, a hearing examiner for this
34 Board entered a Proposed Decision and Order in connection with this
35 appeal. Thereafter, within the period of time provided by law, a Petition
36 for Review was filed and the case referred to the Board for review as
37 provided by RCW 51.52.106.
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- 39 3. The decedent, Donald V. Cawley, died on September 20, 1972, from
40 asphyxiation resulting from choking on a piece of steak he was eating in
41 the course of a business conference lunch.
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CONCLUSIONS OF LAW

Based upon the foregoing findings, the Board makes the following conclusions:

1. The Board has jurisdiction of the parties and subject matter of this appeal.
2. The decedent, Donald V. Cawley, died on September 20, 1972, as a result of an industrial "injury" as that term is defined by RCW 51.08-.100.
3. The decedent, Donald V. Cawley, was in the course of his employment at the time of death.
4. The order of the Department of Labor and Industries dated November 6, 1972, rejecting this widow's claim for benefits, should be reversed, and this claim remanded to the Department of Labor and Industries with instructions to allow the claim and to make such payments therein as may be indicated and authorized by law.

It is so ORDERED.

Dated this 6th day of May, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
PHILLIP T. BORK Chairman

/s/ _____
R.H. POWELL Member

DISSENTING OPINION

I disagree with the majority in this case.

My review of the record made leads me to the conclusion that the proposed Decision and Order dated April 12, 1973 fairly summarizes the testimony in this record and reaches the proper conclusion.

I believe we should look at the Act as providing "work" injury insurance, and I do not believe that the Act contemplated blanket sickness and risk coverage for all fortuitous events; certainly not for this type of risk of living, attempting to bolt a piece of meat obviously too large to be swallowed. There was no traumatic happening occurring from without here. The victim was merely engaged in eating lunch and certainly the object, which was a piece of steak, was within his body at the time he strangled on it. His airway became blocked and he died of asphyxia, which is certainly a condition occurring from within.

1 I would take the position that the unfortunate victim of asphyxiation was performing a normal
2 function, eating food, when a piece of steak blocked his airway. This was not a traumatic
3 happening and injury or would in the sense of the word as defined in Webster. I cannot accept the
4 theory that a soft piece of steak can produce a trauma--"an injury or wound violently produced . .
5 ."(Webster) Asphyxiation results from an obstruction in the windpipe; there is no proof that the
6 action producing the blockage here was traumatic. The obstructing piece of meat was swallowed
7 and lodged or came to rest in the decedent's opening to the windpipe or larynx. There is no proof
8 that this occurred with force and certainly not by reason of trauma.

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13 Mr. Cawley's death did not result from a trauma or occurrence outside his body or "from
14 without". I conclude therefore that Mr. Cawley's death was not caused by an industrial "injury" as
15 that term is defined by RCW 51.08.100.

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17 Accordingly, I dissent.

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19 Dated this 6th day of May, 1974.

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21 BOARD OF INDUSTRIAL INSURANCE APPEALS

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23 /s/ _____
24 R.M. GILMORE Member