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Test of Causation Between Employment and Injury

WORKMEN'S COMPENSATION

TEST OF CAUSATION BETWEEN EMPLOYMENT AND INJURY

A powder plant employee was killed by lightning while proceeding to shelter pursuant to his employer's instructions. In a proceeding for workmen's compensation, experts gave conflicting testimony regarding whether the employee was more exposed to lightning than others in the same locality who were not engaged in the same pursuit. The Indiana Appellate Court affirmed an award of compensation. It held that since the employee would not have been at the place where the lightning struck at the time it struck except for his employment, there was sufficient causative connection between the employment and the death by lightning.[1] On transfer to the Supreme Court the award was affirmed, but on a different ground. The Supreme Court held that the employment "caused" the death, since the Industrial Board could properly find from the evidence that the employee's

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568, 126 Atl. 610 (1924). On the advisability of using conditions precedent and subsequent as a means for discouraging sale see Scobey v. Beckman, 111 Ind. App. 574, 41 N. E.2d 847 (1942); 3 SCOTT, TRUSTS § 401.2.

12. O'Hara v. Grand Lodge, 213 Cal. 131, 2 P.2d 21 (1931); Security-First National Bank v. Easter, 136 Cal. App. 691, 29 P.2d 422 (1934). See note 5 *supra.*

13. Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914); Weakly v. Barrow, 137 Tenn. 224, 192 S. W. 927 (1916).

14. But in Gilman v. Hamilton, 16 Ill. 225 (1854), the existence of a better remedy moved the court to refuse to apply the doctrine of cy pres in authorization of sale.

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1. E. I. Du Pont De Nemours Co. v. Lilly, 75 N. E.2d 796 (Ind. App. 1947).

duties exposed him to an increased risk of being struck by lightning. *E. I. Du Pont De Nemours Co. v. Lilly,* 79 N. E.2d 387 (Ind. 1948).

In a compensation case the claimant must prove that his injury resulted from an accident arising out of and occurring in the course of the employment.[2] In most cases of injury resulting from an act of God, the problem is whether the injury is one "arising out of" the employment within the meaning of the statute. All courts agree that the statutory words refer to and require a causal connection,[3] but there is no uniformity of opinion on the question of the precise degree of causal connection necessary for compensation rights.

Two general tests in determining sufficiency of causal connection have been developed. Most courts, although using differing verbal formulations of the test, make some sort of increased risk a requisite factor to find legal causation.[4] A few courts have adopted the more lenient causal test advanced by the Indiana Appellate Court in this case.[5] In such jurisdictions the employee or his dependents need only show that the employment exposed him to the hazard which caused injury,[6] or as some courts say, that the employment

2. IND. STAT. ANN. (Burns 1933) § 40-1202: ". . . every employer and every employee . . . shall be presumed to have accepted the provisions of this act . . . for personal injury or death by accident arising out of and in the course of the employment. . . ."

3. *E.g., In re* McNicol, 215 Mass. 497, 102 N. E. 697 (1913) from which the following is frequently quoted: ". . . [an injury] arises 'out of' the employment, when there is apparent to the rational mind upon consideration of the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."

4. Some courts purport to determine whether the employee was subjected to a greater risk than the ordinary person in the vicinity: Gesmundo v. Bush, 133 Conn. 607, 53 A.2d 392 (1947) (frostbite); Atlanta v. Parks, 60 Ga. App. 16, 2 S. E.2d 718 (1939) (lightning). Others profess to question whether the employee was subjected to a greater risk than the public generally: L. W. Dailey Construction Co. v. Carpenter, 114 Ind. App. 522, 53 N. E.2d 190 (1940) (heatstroke); Trinity Universal Ins. Co. v. Walker, 203 S. W.2d 308 (Tex. Civ. App. 1947) (heatstroke); Industrial Comm'n v. Laraway, 46 Ohio App. 168, 188 N. E. 297 (1933) (lightning). Still others attempt to decide whether the employee was subjected to an increased or peculiar danger: Lickfett v. Jorgenson, 179 Minn. 321, 229 N. W. 138 (1930) (lightning); Many v. Bradford, 266 N. Y. 558, 195 N. E. 199 (1935) (lightning); Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P.2d 844 (1931) (lightning); Nebraska Seed Co. v. Industrial Comm'n, 206 Wis. 199, 239 N. W. 432 (1931) (lightning).

5. See HARPER, LAW OF TORTS 422 (1st ed. 1933).

6. Deziley v. Semet-Solvay Co., 272 App. Div. 985, 72 N. Y. S. 2d 809 (1947) (lightning); Harding Glass Co. v. Albertson, 208 Ark.

required him to be at the place where the injury occurred.[7] In such a view, increased risk need not be shown.

The record of the Indiana Appellate Court follows a pattern of vacillation between the strict and the lenient types of causal tests. That court recognized in an early decision that even though the risk to which an employee was subjected was no greater than that of the others in the locality there might still be causal connection.[8] In later cases the court held that the employee must be more exposed than others in the locality,[9] that the employee must be exposed to different conditions than those of other employees,[10] and that the employee must be subjected to a greater hazard than the general public[11] in order to claim compensation. In the last decade the court has been moving toward the simple test advanced in the present case, simply that the employment must have exposed the claimant to the injury for which he seeks compensation.[12]

Since the Supreme Court announced its jurisdiction in

866, 187 S. W.2d 961 (1945) (heat prostration); Hughes v. Trustees of St. Patrick's Cathedral, 245 N. Y. 201, 156 N. E. 665 (1927) (heat prostration).

7. Aetna Life Insurance Co. v. Industrial Comm'n, 81 Colo. 233, 254 Pac. 995 (1927) (lightning); *In re* Harraden, 66 Ind. App. 298, 118 N. E. 142 (1917) (street risk).

8. *In re* Harraden, 66 Ind. App. 298, 118 N. E. 142 (1917).

9. Deckard v. Trustees of Indiana University, 92 Ind. App. 192, 172 N. E. 547 (1931).

10. Thompson v. Masonic Cemetery Ass'n, 103 Ind. App. 74, 5 N. E.2d 145 (1936).

11. L. W. Dailey Const. Co. v. Carpenter, 114 Ind. App. 522, 53 N. E.2d 190 (1944); Townsend & Freeman Co. v. Taggart, 81 Ind. App. 610, 144 N. E. 556 (1924).

12. *See* Broderick Co. v. Flemming, 116 Ind. App. 668, 65 N. E.2d 257 (1946); Burroughs Adding Machine Co. v. Dehn, 110 Ind. App. 483, 39 N. E.2d 499 (1942); Montgomery v. Brown, 109 Ind. App. 95, 27 N. E.2d 884 (1940). It is interesting to note that on April 4, 1949, in Mishawaka Rubber & Woolen Mfg. Co. v. Walker, 84 N. E.2d 897 (Ind. App. 1949), the Appellate Court speaking through Bowen, J., seems to have continued its espousal of the simple causation test which the Indiana Supreme Court had rejected. Without citing the instant case, the court said, "While there is great confusion in the recorded cases and the line of demarcation is not too clear when applied to the facts of the particular cases, in determining the question presented by this appeal, we must consider the general rule that an accidental death arises out of the employment when there exists a causal connection between it and the employment. To be compensable, the employment must be in some way responsible for the accidental injury, which was drowning in the instant case, and, *while the more recent cases do not hold that an employee's injury by accident in order to be compensable must arise out of the nature of the employment, the injury suffered must be in some way incidental to the employment.*" *Id.* at 899. (Italics supplied).

workmen's compensation cases in 1940,[13] it has not passed on any cases involving an act of God. But the court has been liberal in its interpretation of the compensation laws.[14] It is therefore surprising that the Supreme Court should repudiate the lenient test advanced by the lower court and adopt the increased risk type test for causation.[15] The higher court attempted to reconcile the conflicting decisions in cases involving lightning and other acts of God by stating that the decisions of the Industrial Board have always been upheld when supported by any probative evidence. The court decided that any lack of consistency may be attributed to factual variations and the inevitable effect of sympathy for injured employees and their dependents.[16]

For two reasons the Supreme Court's reliance on the increased risk test seems unfortunate. Entirely aside from the question of the intrinsic merit of that test, it has been productive of nothing but confusion. Particularly in cases of injury by lightning, where every holding has had its opposite,[17] the difficulty of applying the test with certainty is

13. Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N. E.2d 399 (1940).

14. See, *e.g.*, Patton Park Inc. v. Anderson, 222 Ind. 448, 53 N. E.2d 771 (1944), where a compensation award was affirmed despite objection that the workman was not under the control and supervision of the employer's agent. Evidence to the contrary was objected to by the employer as hearsay, but the court found that there was control and declared that strict rules of evidence did not apply to the proceedings before the Industrial Board, which procedure the statute provided shall be as summary and simple as reasonably possible. And in Soetje & Arnold, Inc. v. Basney, 218 Ind. 538, 34 N. E.2d 26 (1941), the court declared that in determining whether the finding of the Board was supported by the evidence, any evidence unfavorable to the finding must be disregarded and only favorable and reasonable inferences therefrom should be considered.

15. The court cited and apparently approved Deckard v. Trustees of Indiana University, 92 Ind. App. 192, 172 N. E. 547 (1931), a case overruled by the Appellate Court in this case, and Illinois Country Club, Inc. v. Industrial Comm'n, 387 Ill. 484, 56 N. E.2d 786 (1944), a case in which the Illinois Court reversed an award for injuries sustained when a caddy was struck by lightning while standing under a tree in wet clothes and carrying two bags of metal golf clubs.

16. *Cf.* Wells v. Robinson Const. Co., 52 Idaho 562, 16 P.2d 1059 (1932); Illinois Country Club, Inc. v. Industrial Comm'n, 387 Ill. 484, 56 N. E.2d 786 (1944); Mincey v. Dultmeir Mfg. Co., 223 Iowa 252, 272 N. W. 430 (1937) (which indicate an endeavor to keep the burden off the employer).

17. A review of the lightning cases shows the diversity of results obtained from application of the increased risk formula. See Note, 26 MICH. L. REV. 422 (1927); Note, 83 A. L. R. 235 (1933). In one of the first American cases of injury by lightning, the court held that a workman who took shelter under a tree was subjected to an increased risk which established causal connection. State *ex rel.* People's Coal

apparent.[18]

& Ice Co. v. District Court, 129 Minn. 502, 153 N. W. 119 (1915). *Cf.* De Luca v. Board of Park Commissioners, 94 Conn. 7, 107 Atl. 611 (1919). *Contra:* Deckard v. Trustees of Indiana University, 92 Ind. App. 192, 172 N. E. 547 (1931). For occupants of buildings and tents some courts recognize increased danger: Consolidated Pipe Line Co. v. Mahon, 152 Okla. 72, 3 P.2d 844 (1931); Nebraska Seed Co. v. Industrial Commission, 206 Wis. 199, 239 N. W. 432 (1931); Fort Pierce Growers Ass'n v. Storey, 158 Fla. 192, 29 So.2d 205 (1946). *Contra:* Thier v. Widdifield, 210 Mich. 355, 178 N. W. 16 (1920) (barn); Fuqua v. Department of Highways, 292 Ky. 783, 168 S. W.2d 39 (1943) (garage); Griffith v. Cole Bros., 183 Iowa 415, 165 N. W. 577 (1917) (tent). Certain jurisdictions have found increased risk in lightning cases due to the proximity of metal: Hassell Iron Works Co. v. Industrial Commission, 70 Colo. 386, 201 Pac. 894 (1921) (employee welding on a steel bridge); Emmerick v. Hanrahan Brick & Ice Co., 206 App. Div. 580, 201 N. Y. S. 637 (1923) (working near a steel cable); Sullivan v. Roman Catholic Bishop of Helena, 103 Mont. 117, 61 P.2d 838 (1936) (carrying a shovel and standing over a metal pipe line); Traders & General Ins. Co. v. Pool, 171 S. W.2d 135 (Tex. Civ. App. 1937) (working near a boiler engine and under steel guy-wires); Atlanta v. Parks, 60 Ga. App. 16, 2 S. E.2d 718 (1939) (spraying disinfectant from a steel drum); Bauer's Case, 314 Mass. 4, 49 N. E.2d 118 (1943) (standing near an iron bed and electric wiring); Truck Insurance Exchange v. Industrial Accident Comm'n, 77 Cal. App. 2d 461, 175 P.2d 884 (1946) (working near an iron pipe). *Contra:* Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9 (1918) (operating a metal road drag); Griffith v. Cole Bros., 183 Iowa 415, 165 N. W. 577 (1917) (standing near a pile of steel); Alizina Const. Co. v. Industrial Comm'n, 309 Ill. 395, 141 N. E. 191 (1923) (trucking cement in a truck with steel wheels and steel braces); Wells v. Robinson Const. Co., 52 Idaho 562, 16 P.2d 1059 (1932) (plowing with a metal plow); Mincey v. Dultmier Mfg. Co., 223 Iowa 252, 272 N. W. 430 (1937) (walking near a metal gate); Felden v. Horton & Coleman, 234 Mo. App. 421, 135 S. W.2d 1115 (1939) (holding a metal wrench); Illinois Country Club, Inc. v. Industrial Comm'n, 387 Ill. 484, 56 N. E. 2d 786 (1944) (carrying bags of golf clubs). Some courts recognize a greater risk with increased altitude: Truck Insurance Exchange v. Industrial Accident Comm'n, 77 Cal. App.2d 461, 175 P.2d 884 (1946); Bauer's Case, 314 Mass. 4, 49 N. E.2d 118 (1943). *Contra:* Netherton v. Lightning Delivery Co., 32 Ariz. 350, 258 Pac. 306 (1927). Formerly, the courts recognized no additional risk to a workman in the open. Wiggins v. Industrial Accident Board, 54 Mont. 335, 170 Pac. 9 (1918); Hoenig v. Industrial Comm'n, 159 Wis. 646, 150 N. W. 996 (1915). But more recent decisions have held that any outdoor employment increases the danger of harm from lightning: Many v. Bradford, 266 N. Y. 558, 195 N. E. 199 (1935); Mixon v. Kalman, 133 N. J. L. 113, 42 A.2d 309 (1945).

18. Some courts stress the necessity for expert testimony to support a finding of increased risk: Hassell Iron Works Co. v. Industrial Comm'n, 70 Colo. 386, 201 Pac. 894 (1921). Other courts take judicial notice of the increased risk in many instances: De Luca v. Board of Park Commissioners, 94 Conn. 7, 107 Atl. 611 (1919); Madura v. City of New York, 387 N. Y. 214, 144 N. E. 505 (1924). Generally, the finding by the Industrial Board as to the presence or absence of increased risk has been held conclusive: Fort Pierce Growers Ass'n v. Storey, 158 Fla. 192, 29 So.2d 205 (1946); Fuqua v. Department of Highways, 292 Ky. 783, 168 S. W.2d 39 (1943). Some courts, however, have substituted their own findings for that of the administrative agency: Illinois Country Club, Inc. v. Industrial Comm'n, 387 Ill. 484, 56 N. E.2d 786 (1944) (award of compensation reversed); Bauer's Case, 314 Mass. 4, 49 N. E.2d 118 (1943) (denial of compensation reversed).

A more serious objection to the increased risk test is its tendency to undermine the purposes meant to be served by the workmen's compensation statutes. The opinion of the Appellate Court is more consistent with the spirit of the workmen's compensation laws than the conservatism of the Supreme Court. The requirement of an increased risk is a relic of the common law theory of liability based on fault, the very theory which the compensation laws attempted to abolish. The compensation remedy does not adequately repay the employee in cases where it is a substitute for common law liability, but in return the employee is supposed to have the advantage of a more certain and expeditious recovery in all cases. The application of the increased risk test and its consequent uncertainty impairs the statutory purpose and makes compensation dependent upon the whim of the administrative agency.[19] As was pointed out by the Appellate Court in an earlier opinion, there is no sound reason for such a test to determine causal connection.[20]

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19. See note 17 *supra.*

20. Burroughs Adding Machine Co. v. Dehn, 110 Ind. App. 483, 39 N. E.2d 499 (1942). The court said therein: "Many of the limitations upon the granting of compensation under the act are judicial inventions wholly unjustified by the language of the act or the humane purposes of the legislature in enacting it. There is nothing in the language of the act that requires an employee's injury by accident to arise out of the *nature* of the employment, nor is there anything in the language of the Act that requires the risk to which the employee is subjected to be different from the risk to which the general public is subjected." *Id.* at 503-4, 39 N. E.2d at 507.