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Workmen's Compensation-Causation in Sunstroke Cases

RECENT CASE NOTES

WORKMEN'S COMPENSATION—CAUSATION IN SUNSTROKE CASES—Decedent, an employee of defendant, died of sunstroke while working in defendant's cemetery, and while occupied in mowing the grass. This proceeding involves an appeal from an order of the Industrial Board denying complainant compensation under the Indiana Workman's Compensation Act.[1] *Held*—The death of deceased is not compensable as resulting from injury arising out of and in the course of the employment in the absence of evidence that the lawn mower or condition of the grass produced any unusual amount of heat and exposure, or that the employee was subjected to any condition different from that of the other employees.[2]

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[1] There was an additional fact present in the case: the decedent had suffered from the intense heat earlier in the day while serving his own purposes and before entering into the performance of his duties for defendant. It is submitted that this should not be considered an influential factor in the decision rendered in that: (1) it was apparently not deemed of controlling importance by the court; (2) as a basis for refusal of relief, it would tend to conflict with the previously established principle that the employment need not be the sole cause of the death, but it is sufficient if it is a contributing cause: Miami Coal Co. v. Luce (1921), 76 Ind. App. 245, 131 N. E. 824. For analagous causative difficulties, see: Puritan Bed Springs Company v. Wolfe (1918), 68 Ind. App. 330, 120 N. E. 417 (workman rendered susceptible to injury by pre-existing hernia condition); Indian Creek Coal and Mining Company v. Calvert (1918), 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709 (pre-existing disease of the aorta); Owens v. McWilliams (1926), 85 Ind. App. 92, 152 N. E. 841 (pre-existing heart disease).

[2] Thompson v. Masonic Cemetery Association (Ind. App., 1936), —, 5 N. E. (2d) 145. There is no difficulty here as to whether the injury is an

The term 'arising out of the employment'[3] has repeatedly been interpreted to require but proof of a causal relation between the employment and the resulting injury.[4] By the overwhelming weight of authority the court-made test of this relationship in those cases of injury from the elements and more specifically in those involving sunstroke is whether the employee is by reason of his work exposed to a greater risk of harm than that undergone by the general public.[5] If by reason of his employment the danger of injury to his person is enhanced and the hazard is greater than that to which the public generally is subjected, he is then, and then only, entitled to compensation.

It is submitted that as a test of employer responsibility this is objectionable. Obviously, it proves to be a most elusive and deceptive concept. Who is to be considered the general public? As a basis of comparison are we going to choose outdoor workers or indoor workers, or does our concept refer to those who do not work at all? Again, are we referring to the ordinary prudent man, or to the energetic person, or to those who are

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"accident," or whether it happened "in the course of" the employment. As to the former, see: Townsend and Freeman Co. v. Taggart (1924), 81 Ind. App. 610, 144 N. E. 556. As to the latter see: Granite, Sand, and Gravel Co. v. Willoughby ( ), 70 Ind. App. 112, 123 N. E. 194.

[3] Burns, 1933, Section 40-1701 (d). As to the term "employment," it has been said: "The original causative factor [in Workman's Compensation cases] is not a single definite thing but an exceedingly complex, variable, and undefined collection of substances, activities and conditions, making up what is termed the 'employment' of the injured man. It includes not only buildings, machines, instrumentalities, and employees, all under the control of the employer, but also the peculiar environment within which the employee is placed. It thus comprehends not only the activities and physical properties of third persons but even the uncontrollable forces of nature. In compensation law an injury may be said to arise out of the employment, if such employment, in its conditions, its relationships, or its environment in some way causes or occasions the accident from which the injury of the employee arises. Brown, 'Arising Out of And in the Course of the Employment' in Workmen's Compensation Laws. Part III, 8 Wis. L. Rev. 134, 138.

[4] The leading American decision hereon is McNicol's Case (1913), 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A. 306. In accord: United Paperboard Co. v. Lewis (1917), 65 Ind. App. 356, 117 N. E. 276; Smith v. Leslie (1926), 85 Ind App. 186, 151 N. E. 17.

[5] Townsend and Freeman Co. v. Taggart (1924), 81 Ind. App. 610, 144 N. E. 556; In re Harraden (1917), 66 Ind. App. 298, 118 N. E. 142; Skelly Oil Co. v. State Industrial Commission (1923), 91 Okla. 194, 216 P. 933; Kinsey Heating and Plumbing Co. v. House (1931), 152 Okla. 200, 4 P. (2d) 59; Larke v. John Hancock Mutual Life Insurance Co. (1916), 90 Conn. 303, 97 A. 320, L. R. A. 1916 E, 584, 12 N. C. C. A. 308; Slanina v. Industrial Commission (1927), 117 Ohio 329, 158 N. E. 829; Globe Indemnity Co. v. McKindre (1928), 39 Ga. App. 58, 146 S. E. 46; Texas Employer's Ins. Association v. Moore (1925), 279 S. W. 516 (Tex. Civ. App.); New Amsterdam Casualty Co. v. Humphrey (1931), 47 F. (2d) 57, 30 N. C. C. A. 405; Slocum v. Jolley (1927), 153 Md. 343, 138 A. 244; Davies v. Gillespie (1911), 105 L. T. 494; Andrew v. Failsworth (1904), 90 L. T. 611. The phrase "other persons in the same locality" is frequently substituted for the term "general public": Consumers' Company v. Industrial Commission of Ill. (1926), 324 Ill. 152, 154 N. E. 423, 53 A. L. R. 1079; Deckard v. Trustees of Indiana University (1930), 92 Ind. App. 192, 172 N. E. 547. Similarly, with the phrase "other persons in the community": Walsh v. River Spinning Co. (1918), 41 R. I. 490, 103 A. 1025, 13 A. L. R. 956; Kripplaben v. Greenspon's Sons Iron and Steel Co. (Mo. App. 1932), 50 S. W. (2d) 752.

dilatory and carefree? Or is it the duty of the jurist to apply an abstract standard that is a conglomeration of these varying and discordant factors? The very statement of the possible ramifications of the test furnishes the answer of condemnation.[6] Perhaps it is because of this that the practitioner is faced with the realization of his inability to rationalize in any conceivable manner the various conflicting and contradictory holdings even though based upon the same or analogous factual situations.[7]

In view of these very patent difficulties in the remedial application of the test, the courts have undertaken at various times to obtain a more definite standard of responsibility. The instant case might be taken as illustrative of one possible solution of the problem. In rendering its decision, the appellate tribunal emphasized the absence of evidence to show that the decedent was subjected to any greater risk than were other employees. Admittedly this as a test of causal relation is laid down in the alternative, in connection with language that partakes of the usual standard hereinbefore referred to, and yet the decision as a whole, when considered in the light of the case of Cunninghaim v. Warner Gear Company,[8] is beleived to be indicative of a recent tendency on the part of the Indiana court to divest the test of its present generalities. In the Cunninghaim case the court held that "the heat eminating from the pots at which the decedent was working exposed him to a hazard beyond that of the other employees; therefore, the resulting death from heat prostration will be regarded as due to an accident arising out of the employment."[9] Although the attempt to formulate a more positive standard of responsibility is to be commended, it is felt that the test proposed by the court should be rejected.[10] This conclusoin is reached because it will lead to a further delimitation of the field of compensable injuries in that it results in the judicial construction of the term "arising out of the employment" to refer solely to the hazards that surround the performance of the employee's specific duties, over and above those to which he and his fellow servants are subjected by reason of their occupation.

Another effort to render less equivocal the test of causal relation seems traceable to the English decision of Warner v. Couchman.[11] There the

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[6] The standard is criticized in Brown, 'Arising Out of And in the Course of the Employment' in Workmen's Compensation Laws—Part III—8 Wisc. L. Rev. 134, 140-141.

[7] See Brown, supra, page 141, note (19).

[8] (Ind. App., 1935), 198 N. E. 808.

[9] The court cites five cases as sustaining the proposition thus laid down. Of these, two, Townsend and Freeman Co. v. Taggart, supra, note (5) and Walsh v. River Spinning Co., supra, note (5), adopt the majority test and hence are flatly contra; and two of the others, Chapman Price Steel Co. v. Bertels (1931), 92 Ind. App. 634, 177 N. E. 76, and United Paperboard Co. v. Lewis, supra, note (4), fail to specify the test of causative relation used. The fifth State ex rel. Rau v. District Court (1917), 138 Minn. 250, 164 N. W. 916, states as the proper test: "Was the decedent exposed to something more than the normal risk to which men in general engaged in manual labor upon th streets are subjected in hot weather?" (N. E., p. 917).

[10] It was expressly rejected in Ahern v. Spier (1918), 93 Conn. 151, 105 A. 340. Of course, it is inferentially denied by all courts upholding the majority test of causal relation.

[11] (1911), 103 L. T. 693. (F. Moulton, L. J., dissenting.)

court laid down a standard of responsibility predicated upon a showing of a risk greater than that to which the generality of laborers is subjected. Although this theory has had some American following,[12] it is usually repudiated by modern authority, the courts saying that it is not necessary that the risk be peculiar to the particular employment.[13] It, too, should be rejected in that it further restricts employer liability, and goes against the grain of judicial opinion which has enunciated the principle of liberal construction of the requirements of the Workmen's Compensation Acts.[14]

It is submitted, however, with due deference to the weight of authority, that there is a way out of the quandary in which we are placed. It lies in the substitution of the reasonable man concept for that of the general public. Such a change could be accomplished without legislative interference; and since the judicial content of that concept has been determined by past decisions, it would provide a workable basis of comparison from which to judge causative relation. Our test would then be whether the employee has because of his work been subjected to a risk to which, if he were not employed at all,[15] he, as a reasonable man, would not have exposed himself.[16]

In conclusion it should be noted that there is a danger in the unqualified application to Workmen Compensation cases of either the majority test or the one herein proposed. Mere possibility that the injured workman would have otherwise been subjected to the same risk as his employment carries is insufficient.[17] It must appear, before relief can be denied, that as a

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[12] State ex rel. Rau v. District Court, supra, note (9); State ex rel. Nelson v. District Court (1917), 138 Minn. 260, 164 N. W. 917, L. R. A. 1918 F 921; Daugherty's Case (1921), 238 Mass. 456, 131 N. E. 167, 16 A. L. R. 1036; Lewis v. Industrial Commission of Wis. (1922), 178 Wis. 449, 190 N. W. 101, 25 A. L. R. 139 (strong dissent).

[13] Larke v. John Hancock Mutual Life Insurance Co. (1916), 90 Conn. 303, 97 A. 320, L. R. A. 1916 E. 584; Eagle River Building and Supply Co. v. Peck (1929), 199 Wis. 192, 225 N. W. 690, overruling by implication the Lewis case, supra, note (12); Nikkiczuk v. McArthur (1916), 9 Alberta L. R. 503, 28 Dom. L. R. 279; Consolidated Pipe Line Co. v. Mahon (1931), 3 P. (2d) 844, 152 Okla. 72; Ahern v. Spier, supra, note (10). Again, this standard is by implication repudiated by those cases adopting the majority test.

[14] The policy of liberal construction is laid down in Holland-St. Louis Sugar Co. v. Shraluka (1917), 64 Ind. App. 545, 116 N. E. 330; Stacey Brothers Gas Construction Co. v. Massey (1931), 92 Ind. App. 348, 175 N. E. 368, and the cases cited therein.

[15] The phrase "if not employed at all" is included because it is a logical result of the cases noticed in footnote (13).

[16] The word order of the test is, for convenience, changed from that usually found in statements of the present majority standard. Again, when this is done it is more apparent that what we are applying is a form of the "but for" test so well known to the law of causation.

[17] The writer has found no compensation cases expressly establishing this principle. It has, however, been often enunciated in the determination of causative relation in negligence cases: See Davis v. Garrett (1830), 6 Bing. 716; Reynolds v. Texas and P. R. Co. (1885), 37 La. Ann. 694; Harper, The Law of Tort, Section 109, p. 255. "We are in compensation cases applying but a modified form of the 'but for' test used by the courts in the above cited decisions." Harper, supra, Chap. 11.

"practical certainty" he would have been so exposed.[18] As illustrative, let us take the instant case. The death of decedent should have been compensable unless it appeared to be certain that even though he had not been employed, he, as a reasonable man, would still have been exposed to the rays of the sun for hours at a time and engaged in similar muscular activity.[19] While no compensation case has been found expressly recognizing this fact, it is an accepted principle of causation, and is as applicable and socially desirable in this field of the law as in those involving tortious acts.

C. D. L.