Indiana Law Journal

Volume 9 | Issue 4 Article 13

1-1934

Workmen's Compensation-Accidents Arising Out Of and In the Course Of Employment

WORKMEN'S COMPENSATION—ACCIDENTS ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—Plaintiff's decedent, an expert mechanic, was employed by defendant to make repairs and changes in the machinery used in the various buildings of defendant's factory. His usual working hours were from about 6:30 A. M. to 5 or 6 P. M.; he was subject to call in any part of the plant at any time during the day but was not required to account for his time. He was authorized to get his lunch wherever and whenever he thought his work permitted, and it was his custom to eat lunch at a small, independent restaurant across Twelfth Street. On the day of his death decedent went to lunch there at about his usual time, stayed for that purpose for his usual period, and as he was crossing Twelfth Street, on his way toward the factory building located just across the street, he was struck by an automobile, and died as a result of the injuries sustained. Held, that the death of decedent was not the result of an accident arising out of and in the course of employment.[1]

Following the rule that findings of fact in a workman's compensation case, having competent testimony to support them, are conclusive on review,[2] the Appellate Court affirmed the award of the Industrial Board with one judge dissenting. This decision of the board presents the problem of the construction of the phrases "arising out of" and "in the course of" employment, since it is now quite generally recognized that the phrases present two entirely distinct legal problems[3] although used conjunctively in the same sentence.

An accident is said to "arise out of" the employment when there exists a causal connection between the conditions under which the work is required to be performed and the resulting injury,[4] while the phrase "in the course of" employment is held to designate an accident occurring within the period of employment at a place where the employee may reasonably be while fulfilling his duties or engaged in something incidental to it.[5] The

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[1] Mitchell v. Ball Bros. (1933), 186 N. E. 900 (Ind. App.).

[2] Star Publishing Company v. Johnson (1925), 83 Ind. App. 309, 146 N. E. 765; J. H. Hardin Company v. Crowe (1924), 81 Ind. App. 513, 143 N. E. 710; Steel and Tube Company of America v. Kukovac (1923), 141 N. E. 643, 81 Ind. App. 219; Pan Handle Coal Co. v. Decousey (1922), 78 Ind. App. 580, 136 N. E. 577; Standard Coal Co. v. Gallagher (1921), 75 Ind. App. 1, 129 N. E. 482.

[3] Stacey Brothers Gas Construction Company v. Massy (1931), 92 Ind. App. 348, 175 N. E. 368; Townsend and Freeman v. Taggart (1921), 81 Ind. App. 610, 144 N. E. 556; Indiana Creek Co. v. Calvert (1918), 68 Ind. App. 474, 119 N. E. 519; Granite Sand and Gravel Company v. Willoughby et al (1919), 70 Ind. App. 112, 123 N. E. 199; In re Ayers (1918), 66 Ind. App. 458, 118 N. E. 386; Holland-St. Louis Sugar Company v. Shraluka (1917), 64 Ind. App. 545, 116 N. E. 330; Kennerson v. Thames Towboat Co. (1915), 89 Conn. 367, 94 Atl. 372; Young v. Duncan (1914), 218 Mass. 346, 106 N. E. 1; Matter of Petrie (1915), 215 N. Y. 335, 109 N. E. 549; Donahue v. Sherman Sons Co. (1916), 65 Ind. App. 1917, 117 N. E. 276; Hopkings v. Michigan Sugar Co. v. Lewis (1916), 184 Mich. 87, 150 N. W. 324; Haskell v. Brown (1917), 67 Ind. App. 178, 117 N. E. 555; Harper, Torts (1933), P 426.

[4] Holland-St. Louis Sugar Company v. Shraluka (1917), 64 Ind. App. 545, 115 N. E. 330; In re Employers Liability Assurance Company (1913), 222 Mass. 163, 109 N. E. 951; Elk Grove Union High School District v. Industrial Acc. Comm. of Cal. (1917), 34 Cal. App. 589, 168 Pac. 392.

[5] Granite Land and Gravel Company v. Willoughby (1919), 70 Ind. App. 112, 123 N. E. 194; Marchratello v. Lunch Realty Co. (1920), 94 Conn. 260, 108 Atl. 799; New Amsterdam Casualty Co. v. Sumrell (1923), 30 Ga. App. 682, 118 S. E. 786; In re Ayers (1917), 66 Ind. App. 458, 118 N. E. 386; Terlecki v. Strauss

court in the principal case found that decedent was injured "in the course of his lunching hour" rather than "in the course of his employment," and that there was no causal connection between his employment and the act resulting in his injury.

There is a long line of cases holding that the relation of master and servant may extend beyond the hours of the servant's actual labor,[6] and that acts of ministration unto himself, performance of which while at work are reasonably necessary to his health and comfort, are acts of service within the meaning of the Workmen's Compensation Act although they are in a sense personal to himself and only remotely and indirectly conducive to the object of the employment.[7] Thus recovery has been allowed in the following cases: Where the employee was injured while crossing a yard to take advantage of conveniences in the factory of another manufacturer, since none were provided in the employer's factory;[8] where one was employed as drayman continuously from eight in the morning until eight in the evening without intervals for meals, and left his team to get a glass of beer and was killed by a motor car while returning;[9] where a mechanic who was subject to call at any time, was sent out to see about a battery and while returning stopped for lunch, started to walk back to his employer's factory to report sales, and was injured by an auto while boarding a street car;[11] where a street car conductor having stopped his car in front of his home went in to order his lunch sent to a place designated by his employer and was struck by a car on another track while returning.[12] The recent Indiana case of Livers v. Graham Glass Co. permitted a recovery where a factory superintendent who was subject to call day and night, while on his way to check up on the day's work, as was his custom, although he was not required to do so, was killed in an automobile accident;[13] and a Texas case permitted recovery where a workman was killed at a railroad crossing directly on his route to work even though the hour had not yet arrived when he was supposed to report.[14] In all these cases the injury occurred while the employee was not on premises owner or controlled by the employer and when

(1914), 85 N. J. Law 454, 89 Atl. 1023; Sundine's Case (1914), 218 Mass, 105 N. E. 433; Jeffries et al v. Pitman-Moore Company (1925), 83 Ind. App. 159, 147 N. E. 919.

[6] City of Milwaukee v. Atthoff (1914), 156 Wis. 68, 145 N. W. 238; Terlecki v. Strauss (1914), 85 N. J. Law 454, 189 Atl. 1023; Jeffries v. Pitman-Moore Co. (1925), 83 Ind. App. 159, 147 N. E. 919.

[7] In re Ayers (1917), 66 Ind. App. 458, 118 N. E. 386; Holland-St. Louis Sugar Company v. Shraluka (1917), 64 Ind. App. 545, 116 N. E. 330; Archibald v. Ott (1916), 77 W. Va. 448, 87 S. E. 791; Clem v. Chalmers Motor Co. (1914), 178 Mich. 340, 144 N. W. 848; Matter of Moore v. Lehigh Valley R. Co. (1915), 154 N. Y. S. 620; Larke v. Hancock Mutual Life Ins. Co. (1916), 90 Conn. 303, 97 Atl. 320, Dzikouska v. Superior Steel Co. (1918), 259 Pa. 578, 103 Atl. 351.

[8] Fearnley v. Bates (1917), 117 L. T. 163; (1917-18), 27 Yale L. Rev. 424; Zabriskie v. Erie R. Co. (1914), 85 N. J. Law 157, 92 Atl. 385.

[9] Martin v. Lobebard & Co. (1914), 136 L. T. J. 402.

[10] Consolidated Underwriters v. Breedlove (1924), 114 Texas 172, 265 S. W. 128.

[11] J. E. Porter Co. v. Industrial Commission (1922), 301 Ill. 76, 133 N. E. 652.

[12] Rainford v. Chicago Ry. Co. (1919), 289 Ill. 427, 124 N. E. 643.

[13] Livers v. Graham Glass Co. (1931), 177 N. E. 359 (Ind. App.).

[14] Cundaly Packing Co. v. Parramour (1923), 44 S. C. 153.

he was not engaged in labor, so are somewhat difficult to distinguish from the principal case.

The courts have had even less difficulty in finding that the accident arose out of and in the course of the employment when the accident occurred on the premises of the employer even though the employee was not engaged in actual labor. For instance: Employee was injured while asleep in a car provided for that purpose and was subject to call at any time;[15] where an employee was injured after starting to lunch by the ordinary route;[16] where an employee used the customary means of ingress or egress across the employer's premises or was injured on a way maintained by him;[17] where decedent was changing his clothing after working hours preparatory to going home;[18] where plaintiff, engaged in loading steel upon a car, struck a match to light a cigarette and set fire to his oil-soaked apron and was fatally burned;[19] where an employee driver came inside after working outside in cold weather for several hours and sat down near a boiler fire while waiting for opportunity to use an elevator and fell asleep and caught fire;[20] where deceased died as a result of drinking from a bottle which he thought contained water kept for that purpose but which in fact contained poison;[21] where an employee was running from his place of work to punch the time clock when the noon whistle blew, and was injured by colliding with another employee;[22] where workmen were descending in a material hoist from the top of a building where they had been working after noon hour had begun;[23] where an employee stopped work at her machine shortly before noon to comb her hair, as was her custom, and was injured when her hair was caught in the machine;[24] where a park workman who obtained shelter under a tree during a violent thunderstorm was killed by lightning;[25] where a baker fell out of a window to which he had gone for air during a rest period;[26] where an employee was injured in answering a private telephone call;[27] and in numerous similar instances.

Nor has there been any difficulty where the employee was injured on his way to or from work on premises not owned or controlled by the employer[28] when the employee was authorized to use that way.[29] In prac-

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[15] St. Louis A. & T. Ry. Co. v. Welch (1888), 72 Texas 298, 10 S. W. 529.

[16] Bylow v. St. Regis Paper Co. (1917), 166 N. Y. S. 874.

[17] Ewald v. C. & N. W. Ry. Co. (1888), 70 Wis. 420, 36 N. W. 12; Jeffries v. Pitman-Moore Co. (1925), 83 Ind. App. 159, 147 N. E. 919; Wabash Ry. Co. v. Industrial Comm. (1920), 294 Ill. 119, 128 N. E. 290; In re Stacey (1916), 225 Mass. 174, 114 N. E. 206.

[18] Helmke v. Thilmarry (1900), 107 Wis. 216, 83 N. W. 360.

[19] Dzikowska v. Superior Steel Co. (1918), 259 Pa. 573, 103 Atl. 351.

[20] Richards v. Indianapolis Abattoir Co. (1917), 92 Conn. 274, 102 Atl. 654.

[21] Archibald v. Ott (1916), 77 W. Va. 448, 87 S. E. 791.

[22] Rayner v. Sligh Furniture Co. (1914), 180 Mich. 168, 146 N. W. 664.

[23] Boyle v. Columbia Fireproofing Co. (1902), 182 Mass. 93, 64 N. E. 726.

[24] (1913-14), 23 Yale Law Jr. 699; Terlecki v. Strauss (1914), 86 N. J. Law 708, 89 Atl. 1023.

[25] Chulla D. Lucas v. Board of Park Comm. of Hartford (1919), 107 Atl. 611.

[26] National Biscuit Co. v. Roth (1925), 83 Ind. App. 21, 146 N. E. 410.

[27] In re Cox (1916), 225 Mass. 220, 114 N. E. 280.

[28] (1916-1917), 65 U. of Pa. Law Rev. 701; City of Milwaukee v. Althoff et al (1914), 156 Wis. 68, 145 N. W. 238; In re Sundine (1914), 218 Mass. 105 N. E. 433.

[29] Lumberman's Reciprocal Association v. Behnkey (1922), 112 Texas 103, 246

tically every case where recovery has been refused the employee had a definite time set aside for lunch and was not subject to the call of the employer,[30] was using a forbidden way,[31] or was not required to go into the street and thus was not exposed to those dangers.[32]

By analogy to the cases cited in the foregoing discussion, and on the authority of Livers v. Graham Glass Co.[33] it would seem that the Board might fairly have reached an opposite result, particularly in view of the repeated holding of the Indiana Court that the statute on which this action is based should be liberally construed.[34] A. A. C.

S. W. 72; (1919-20), 18 Mich. Law Rev. 439; Universal Portland Cement Company v. Spirakes (1922), 79 Ind. App. 17, 137 N. E. 276.

[30] Pearce v. Industrial Comm. (1921), 299 Ill. 161, 132 N. E. 440; Moore v. Sefton Mfg. Co. (1924), 82 Ind. App. 89, 144 N. E. 476.

[31] Hills v. Blair (1914), 182 Mich. 20, 148 N. W. 24; Moore v. Sefton Mfg. Co. (1924), 82 Ind. App. 89; 144 N. E. 476; H. W. Nelson Railroad Construction Company v. Industrial Comm. of Ill. (1919), 286 Ill. 632, 122 N. E. 113.

[32] Diebhert v. Bevens (1933), 185 N. E. 311 (Ind. App.); Clark v. Voorhees (1921), 231 N. Y. 14, 131 N. E. 553.

[33] Livers v. Graham Glass Co. (1931), 177 N. E. 359 (Ind. App.).

[34] Holland-St. Louis Sugar Company v. Shraluka (1918), 64 Ind. App. 545, 116 N. E. 330; In re Ayers (1919), 66 Ind. App. 458, 118 N. E. 386; Nordyke & Marmon Company v. Swift (1919), 71 Ind. App. 176, 123 N. E. 449; Granite Land and Gravel Company (1919), 70 Ind. App. 112, 123 N. E. 194; In re Bollman (1920), 73 Ind. App. 46, 126 N. E. 639; United Paper Company v. Lewis (1917), 65 Ind. App. 356, 117 N. E. 276; Haskell v. Brown (1917), 67 Ind. App. 178, 117 N. E. 555; Indian Creek Company v. Calver (1918), 68 Ind. App. 474, 119 N. E. 519; Townsend v. Freeman v. Taggart (1924), 81 Ind. App. 610, 144 N. E. 556; Stacey Brothers Gas Construction Company v. Massey (1931), 92 Ind. App. 348, 175 N. E. 368.