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Workman's Compensation--Arising out of the Employment

WORKMAN'S COMPENSATION—ARISING OUT OF THE EMPLOYMENT—The appellant alleged that, on the 14th day of April, 1931, he received certain personal injuries by reason of an accident arising out of and in the course of his employment in the appellee's factory, by reason of which he lost his left eye. When no agreement, as to compensation, could be reached, the appellant filed his application with the Industrial Board, on account of said injuries, on the 5th day of June, 1931, and was heard by a single member of the board, who found in favor of the appellant. The appellee on the 28th day of October, 1931, filed an application for a review by the full board, which found that the appellant's alleged accidental injury was not the result of an accident arising out of and in the course of his employment. The appellant appealed, assigning as error that "the finding and order of the Full Industrial Board is contrary to law." *Held*, the accidental injury did not cause the disability of the appellant.[1]

The court, without an analysis of the causal relation of the accident, the injury and the employment, affirmed the award of the Industrial Board by following the rule, that, where there is some evidence to support the finding, the award is conclusive, if there has been proper notice and a full

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[14] *State v. Farmers & Merchants Nat. Bank* (1919), 71 Ind. App. 216, 124 N. E. 501.

[15] *Fletcher Savings & Trust Co. v. American State Bank* (1925), 196 Ind. 118, 147 N. E. 524.

[16] *Crowder, Rec., v. Sandusky* (1929), 91 Ind. App. 200, 170 N. E. 792; *Allen & Steen Acceptance Co. v. Cook, Rec.* (1930), 93 Ind. App. 682, 173 N. E. 460; *Crowder v. Abbott* (1931), 178 N. E. 860; *Mock v. Stultz* (1932), 179 N. E. 561; *Terre Haute Trust Co. v. Scott* (1932), 181 N. E. 369.

[17] *Stults, Rec., v. Gordon, Adm.* (1929), 89 Ind. App. 611, 167 N. E. 564.

[18] Acts 1931, Chapter 167, page 580. That hereafter, upon the insolvency, suspension or liquidation of any bank of discount and deposit, or loan and trust and safe deposit company, while acting as executor, administrator, receiver, guardian, assignee, commissioner, agent, attorney-in-fact, or in any other fiduciary capacity, the person or persons beneficially entitled to receive the property and proceeds held in trust by it as aforesaid, or its successors in trust, shall have preference and priority over its general creditors in all assets of such bank or loan and trust and safe deposit company, for all uninvested funds so held in trust to the extent of any commingling with its general assets or which may not be duly accounted for.

[19] *Rottger v. Delta Delta Delta Realty Corporation* (1933), 184 N. E. 412.

[1] *Hess v. Ohlen Bishop Co.*, Appellate Court of Indiana, Dec. 15, 1932. 183 N. E. 387.

hearing before an impartial tribunal, acting within the scope of its authority.[2] The conclusiveness of the Industrial Board's award, if based on a proper procedure and a proper application of the law,[3] is supported by the decisions, which hold that the awards of similar bodies are conclusive, where there has been a proper procedure before an impartial tribunal.[4]

The class of injuries, contemplated by the Indiana Compensation Act,[5] is a personal injury arising out of and in the course of employment. A personal injury to be compensable must result from an accident, and the accident must "arise out of the employment." The word accident, as used in this act, is used in the popular sense, and means any unlooked for mishap or untoward event not expected or designed.[6] The courts, by a liberal construction of the meaning of the word accident, have included many types of injuries within the compensation statutes. The following examples are illustrative: strains;[7] injuries received as a result of an assault and battery;[8] drowning;[9] burnsitis or "house maid's" knee, which results from the workman's being on his knees for several days scraping the floor;[10] sunstroke;[11] inhaling of gas fumes;[12] drinking contaminated water, furnished

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[2] *International Shoe Co. v. Federal Trade Comm.* (1930), 280 U. S. 291, 50 Sp. Ct. 89; *Hardware Dealers Mut. Fire Ins. Co. v. Glidden* (1931), 284 U. S. 151, 52 Sp. Ct. 69; *Tagg Bros. and Moorhead v. United States* (1929), 280 U. S. 420, 50 Sp. Ct. 220; *Phillips v. Commonwealth* (1930), 283 U. S. 589, 51 Sp. Ct. 608; *Bell v. Hayes Ionia Co.* (1916), 192 Mich. 90, 158 N. W. 179; *Bergstrom v. Industrial Comm.* (1918), 286 Ill. 29, 121 N. E. 195.

[3] *Noble v. Union River Logging Co.* (1892), 147 U. S. 165, 13 Sp. Ct. 271; *Western Chemical Co. v. United States* (1925), 271 U. S. 268, 46 Sp. Ct. 500; *Chicago & R. I. & Pac. R. R. Co. v. United States* (1927), 274 U. S. 29, 47 Sp. Ct. 486; *Virginia R. R. Co. v. United States* (1928), 272 U. S. 658, 47 Sp. Ct. 222.

[4] *Meeker v. Lehigh Valley R. R. Co.* (1914), 236 U. S. 412, 35 Sp. Ct. 337; *Mills v. Lehigh Valley R. R. Co.* (1914), 238 U. S. 473, 35 Sp. Ct. 888; *Spiller v. Atch. & Santa Fe R. R. Co. and Others* (1919), 253 U. S. 117, 40 Sp. Ct. 466; *Old Colony Trust Co. v. Comm.* (1929), 279 U. S. 716, 49 Sp. Ct. 499 (Bd. Tax. App.); *Virginia R. R. Co. v. United States* (1926), 272 U. S. 658, 47 Sp. Ct. 222 (I. C. C.); *Fed. Trade Comm. v. Eastman Kodak Co.* (1927), 274 U. S. 619, 37 Sp. Ct. 688; *Williamsport Wire Rope Co. v. United States* (1928), 277 U. S. 551, 48 Sp. Ct. 140.

[5] Burns' Revised Statutes, 1926, Section 9447.

[6] *Haskell & Barker Car Co. v. Brown* (1917), 67 Ind. App. 178, 117 N. E. 555; *Fenton v. Thorley Co.* (1913), App. Cas. 443; *Boody, Administrator v. K and C. Co.* (1914), 77 N. H. 208, 90 Atl. 859; *Vennen v. New Dells Lumber Co.* (1915), 161 Wis. 370, 154, N. W. 640; *Adams v. Acme Co.* (1914), 182 Mich. 157, 148 N. W. 485; *Southwestern, etc., Co. v. Pillsbury* (1916), 172 Cal. 768, 158 Pac. 762.

[7] *Puritan Bed Springs Co. v. Wolfe* (1918), 68 Ind. App. 330, 120 N. E. 417; *Terre Haute Malleable Co. v. Wehrle* (1921), 76 Ind. App. 656, 132 N. E. 698.

[8] *Ohio Bldg. Safety Vault Co. v. Ind. Comm.* (1917), 277 Ill. 96, 115 N. E. 149; *Polar Ice and Fuel Co. v. Mulray* (1918), 67 Ind. App. 270, 119 N. E. 149; *Heidman v. American Dist. Tel. Co.* (1921), 230 N. Y. 205, 130 N. E. 302; *Dean v. Stockham* (1929), (Ala.), 123 So. 225.

[9] *Bundy v. State Highway Commission* (1929), (Vt.), 146 Atl. 68.

[10] *Standard Cabinet Co. v. Ind. Board* (1921), 76 Ind. App. 593, 132 N. E. 661.

[11] *Lane v. Horn and Hardart Brick Co.* (1918), 261 Pa. 329, 104 Atl. 615; Daughtery's Case (1921), 238 Mass. 456, 131 N. E. 167; *Murray v. Cummings Constr. Co.* (1921), 232 N. Y. 507, 134 N. E. 549.

[12] *Naud v. King Serving Machine Co.* (1916), 233 N. Y. 567, 119 N. E. 1061; *Tinctic Milling Co. v. Ind. Comm.* (1922), 60 Utah 14, 206 Pac. 278; *Traveler's Ins. Co. v. Smith* (1924), 266 S. W. 574. *Contra: Meade Fiber Corp v. Starnes* (1923), 147 Tenn. 362, 247 S. W. 989; *Depre v. Pacific Coast Forge Co.* (1929), 276 Pac. 89; *Elkhorn Coal Corp. v. Kerr* (1924), 203 Ky. 804, 263 S. W. 342.

by the employer, which results in typhoid fever;[13] pneumonia, which results from a weakened condition of the body due to an injury.[14] and where germs enter the body through the broken fissures of the skin.[15]

Before an accident can be said to "arise out of the employment" there must be a certain causal connection between the employment and the accident. In *re McNichols*,[16] it was stated that it "arises out of the employment," when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is to be done and the resulting injury. If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person, familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it "arises out of the employment." The personal injury must be the result of the employment and flow from it as the inducing proximate cause and the rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency.[17] This statement of the causal relation seemingly excludes any injury, which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed irrespective of the employment; and demands that the causative danger be incidental to and peculiar to the work and not common to the neighborhood. This was the early and the most strict view, as illustrated by the so-called "street cases," which denied recovery on the ground that the members of the public similarly situated were likewise exposed.[18] However, it was not long until exceptions were made in the case of those employees, who were forced to continually use the streets, the dangers of which were common to all.[19] The more liberal and the prevailing view disregards the frequency of the use of the streets and allows recovery, even though the employee is required to be upon the street only occasionally.[20]

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[13] *Vennen v. New Delles Lumber Co.* (1915), 161 Wis. 370, 154 N. W. 640; *Aetna Life Ins. Co. v. Portland Gas & Coke Co.* (1916), 229 Fed. 552.

[14] *Bergstrom v. Ind. Comm.* (1918), 286 Ill. 29, 121 N. E. 195; *Anderson v. Ind. Comm.* (1921), 116 Wash. 421, 199 Pac. 747; *Robertson v. Ind. Acc. Comm.* (1925), 114 Ore. 394, 235 Pac. 684.

[15] *Hart v. Wilson* (1919), 227 N. Y. 554, 124 N. E. 898; *Connelly v. Hunt Furniture Co.* (1925), 240 N. Y. 83, 147 N. E. 366.

[16] (1913), 215 Mass. 497, 102 N. E. 697.

[17] *In re Madden* (1913), 222 Mass. 487, 111 N. E. 379; *Kokomo Steel and Wire Co. v. Ind. Board* (1923), 81 Ind. App. 610, 141 N. E. 796; *Mueller Constr. Co. v. Ind. Board* (1918), 283 Ill. 148, 118 N. E. 1028; *Rayner v. Sligh* (1914), 180 Mich. 168, 146 N. W. 665.

[18] *Read v. Baker L. R.* (1916), 1 K. B. 927; *Colarullo v. Woodland Golf Club* (1927), (Mass.), 155 N. E. 425.

[19] *Larke v. John Hancock Mut. Life Ins. Co.* (1916), 90 Conn. 303, 97 Atl. 320; *State Camp. Ins. Fund v. Ind. Acc. Comm.* (1924), 194 Cal. 28, 227 Pac. 168; *Re Harraden* (1917), 66 Ind. App. 298, 118 N. E. 142; *Capital Paper Co. v. Conner* (1924), 81 Ind. App. 545, 144 N. E. 474; Gardner's Case (1924), 247 Mass. 308, 142 N. E. 247.

[20] *Kunze v. Detroit Shade Tree Co.* (1916), 192 Mich. 435, 158 N. W. 851; *Globe Indemnity Co. v. Ind. Comm.* (1917), 36 Cal. App. 288, 171 Pac. 1088; *Mueller Constr. Co. v. Ind. Board* (1918), 283 Ill. 148, 118 N. E. 1028; *Empire Health and Accident Co. v. Purcell* (1921), 76 Ind. App. 551, 132 N. E. 664; *Stockley v. School District* (1925), 231 Mich. 523, 204 N. W. 715; *Palmer v. Main* (1925), 209 Ky.

The same causative principles, which apply to the street accident cases, apply to the lightning cases. In *Netherington v. Lightning Delivery Company*,[21] in which the employee was killed while driving a truck from a low to a higher sea level, recovery was denied, because such accident in no sense "arose out of the employment" or was incidental thereto. However, in an analogous case,[22] compensation was allowed, when an employee, who was working on a scaffold, was struck by lightning. It was argued that the employee would not have been struck had he not been where he was at the time. Therefore the employment was the cause in fact. Whether it was also the legal cause will depend upon whether or not the lightning should be regarded as such an independent intervening agency as to constitute a superceding cause. It should not be so regarded, if it was reasonably foreseeable, as a hazard of the employment. Therefore, if the employment is of such nature as to increase the chances of injury by lightning, it should be compensable as "arising out of the employment." In a California decision,[23] the liberal and what seems to be the most logical view and the present tendency was aptly presented: "Where one in the course of his employment is reasonably required to be at the particular place at that particular time, and there meets with an accident, such accident 'arises out of the employment' although any other person at such a place would have met with such accident, irrespective of the employment." Other injuries due to the elements are subject to almost the same analysis. Thus injuries due to freezing "arise out of the employment" if, because of the employment and the conditions under which the work is done, the employee is peculiarly exposed to severe weather and the hazards of the elements are thereby increased.[24]

The principles of legal causation also control recovery for injuries due to assault and battery by fellow employees or strangers.[25] If the altercation and subsequent injuries arise over the work, the injury "arises out of the employment." Although the assault of the employee is an intervening agency, but for which the injury would not have occurred, yet it is foreseeable that men will quarrel over their work and be provoked to assault. Had it not been for the employment, there would have been no occasion for this particular group to be together and there would have been no occasion for the altercation. Therefore the employment furnished the reason, the time and the place for such an event. This causal relation was clearly depicted in *Dean v. Stockham*,[26] in which a night watchman was killed. The employment involved the employee's being alone on the premises with his wages in his pocket, thus furnishing an opportunity for the robbery without interference, a risk to which he would not have been equally exposed apart from the employment.

226, 272 S. W. 736; *Dennis v. White* (1917), App. Cas. 479; *Bookman v. Lyle Culvert Road Equipment Co.* (1922), 153 Minn. 479, 198 N. W. 894; *Zabriskie v. Erie R. R. Co.* (1914), 82 N. J. L. 266, 92 Atl. 385.

[21] (1927), (Ariz.), 258 Pac. 306.

[22] *Andrew v. Fainsworth Society* (1904), 2 K. B. 32.

[23] *Aetna Life Insurance Co. v. Ind. Comm.* (1927), 254 Pac. 995.

[24] *Larke v. John Hancock Mutual Life Ins. Co.* (1916), 90 Conn. 303, 97 Atl. 320.

[25] *Heidman v. American Dist. Tel. Co.* (1921), 230 N. Y. 305, 130 N. E. 302; *Ohio Building Safety Vault Co. v. Ind. Board* (1917), 277 Ill. 96, 115 N. E. 49.

[26] (1929), (Ala.), 123 So. 225.

A similar problem is involved in the so-called "horse play" cases. Many courts deny recovery in such cases on the ground that the activities of the fellow workers engaged in "horse play" are independent, intervening agencies and are unforeseeable, and therefore break the chain of causation between the employment and the injury so that the injury cannot be regarded as "arising out of the employment."[27] It is submitted that Judge Cardozo in a New York decision[28] recognized such a causal relation between the employment and the injury in the "horse play" cases and followed the most logical and the better rule, when he stated that the test of liability under the workman's compensation statute is not the master's dereliction. The test of liability is the relation of the service to the injury, of the employment to the risk, and that the risks of such associations were the risks of the employment. This test seems very persuasive, since it is a matter of common knowledge to everyone, who employs labor, that there is always a certain amount of risk from practical jokes, when men and boys are together in groups, even while working.[29]

Therefore it seems that, regardless of the kind or class of injury, a personal injury to come within the compensable class, as "arising out of the employment, must have resulted from an accident and must have been legally caused by the employment; and that, when this condition exists, the test, laid down in *re McNichols*,[30] applies.

The principles of causation hitherto discussed are likewise applicable to the instant case. The appellee admits that the employment was the cause in fact of the accident, but denies the appellant's claim that the accident was the legal or proximate cause of the injury complained of. The Industrial Board found that there was some evidence to support the appellee's contention. Therefore, for the appellant to recover compensation, it was necessary for him to prove not only that the accident was the legal or proximate result of the employment and flowed from it as the inducing legal or proximate cause, but to prove that the accident was the legal or proximate cause of the injury complained of. J. H. H.

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[27] *Payne v. Industrial Comm.* (1920), 295 Ill. 388, 129 N. E. 122; *Coronado Beach Company v. Pillsbury* (1916), 172 Cal. 682, 158 Pac. 212.

[28] *Leonbruno v. Champlain Silk Mills* (1920), 229 N. Y. 47, 128 N. E. 711.

[29] *Hulley v. Mossbuegger* (1915), 87 N. J. L. 103, 93 Atl. 79.

[30] *Supra*, Note. 16.