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WORKMEN'S COMPENSATION—INJURIES ARISING OUT OF EMPLOYMENT—

Kenneth Deckard was employed as a laborer by the trustees of Indiana University to cut sod. While he was at work on June 19, 1928, a storm arose; it began to rain, and he sought shelter under a tree. Lightning

struck the tree, and he was fatally injured. The plaintiff, his widow, claimed compensation under the Workmen's Compensation Act, but it was denied her by the Industrial Board on the ground that deceased's injury did not arise "out of" his employment. *Held*, affirmed. *Deckard v. Trustees of Indiana University*, Appellate Court of Indiana, Sept. 4, 1930, 172 N. E. 547.

The requirement that the injury should arise out of the employment has received voluminous interpretation from all courts, including those of Indiana, which have had to deal with the Workmen's Compensation Act. And since under the common law and the Employers' Liability acts it was necessary to determine when an injury was a result of and caused by the employment, it is very probable that those decisions have guided courts in interpreting "arise out of" under the Compensation act. Under the Employers' Liability act of 1893, which was substantially a re-enactment of the common law in Indiana as it existed at that time (*Cleveland Ry. Co. v. Scott*, 29 Ind. App. 519, 64 N. E. 896), a servant could not recover compensation unless he could show his injuries were occasioned by the negligence of the master (*Dill v. Marmon*, 164 Ind. 507, 73 N. E. 67); and the master was not guilty of negligence when the servant's injury was unusual and not reasonably to be anticipated from the appliances used or the place in which he worked (*Standard Pottery Co. v. Mondy*, 35 Ind. App. 427, 73 N. E. 188). It was pointed out that an employer was not liable when the intervention of an independent human agency caused the injury, as when a person came on the premises and threw a stick of wood at the employee, *Nickey et al. v. Steuder*, 164 Ind. 189, 73 N. E. 117. And under the act of 1911 (Burns 1914, sec. 8020a) the employer's liability was still confined to injuries which followed some negligence on his part with reference to the materials, the place, or the work. *Decatur v. Eady*, 186 Ind. 205, 115 N. E. 577.

But, since no question of fault on the part of either party affects liability under the Compensation act of 1915 (Burns 1926, sec. 9446-9448: *In re Bowers, etc.*, 65 Ind. App. 128, 116 N. E. 842), the courts were forced to define the phrases "arise out of" and "in the course of." Indiana, along with the majority of the states, holds that these phrases should be liberally construed. *Nordyke & Marmon Co. v. Swift*, 71 Ind. App. 176, 123 N. E. 449. But an accident to be compensable within the act must have its origin in some risk of the employment, *Kokomo Steel & Wire Co. v. Irick*, 80 Ind. App. 610, 141 N. E. 796; *Townsend & Freeman Co. v. Taggart*, 81 Ind. App. 610, 144 N. E. 556; *Smith v. Leslie*, 85 Ind. App. 186, 151 N. E. 17. There must be a casual connection, *C. I. & L. Ry. Co. v. Clendenning*, 81 Ind. App. 323, 143 N. E. 303. Or it may be a question of fact where liability ceases, because it involves a risk not arising out of the employment, *Indian Creek Coal Co. v. Wehr*, 74 Ind. App. 141, 127 N. E. 202. In *Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149, where an employee was shot by a fellow employee because of a quarrel over their work, it was held his death arose out of the employment. And typhoid fever contracted from water, polluted by a fellow employee's negligence, was held to be an accident arising out of and in the course of employment, *Chicago, S. B. & N. I. Ry. Co. v. Brown*, 77 Ind. App. 279, 133 N. E. 609. Analogous situations involving the same question have arisen in other jurisdictions.

Compensation was granted where a night-watchman was robbed and killed (*Dean v. Stockham Co.*, Ala. 1929, 123 So. 225); but was denied for an employee who was drowned in a flood (*Bundy v. State Highway Dept.*, Vt. 1929, 146 A. 68); likewise it was denied for an employee who was killed by a falling telephone pole caused by a tornado (*Salanian v. Ind. Comm.*, Ohio 1927, 158 N. E. 829); but in another tornado case (*Merrilly v. Penasco Lbr. Co.*, 27 N. Mex. 632, 204 Pac. 72) a recovery was permitted because the court decided the employment necessarily accentuated the natural hazard, and subjected the employee to greater risk than the general public. The same principle was enunciated in two California cases where the injuries resulted from falling walls and flying glass caused by an earthquake; the compensation was allowed in one case (*Indiana Dairy Co. v. Ind. Comm.*, 259 Pac. 1099) and denied in the other (*London, etc. Co. v. Ind. Comm.*, 259 Pac. 1096).

Various "lightning" cases are cited in the principal case, in some of which compensation was granted and in others denied. Seemingly they are all based on the same principle—that to warrant recovery of death resulting from lightning, the employment itself must have increased the hazard, so that the employee was subjected to greater risk than the public generally. The results founded on this rule, however, are startlingly different. For instance: In *Andrew v. Fallsouth Society* (1904) 2 K. B. 32, compensation was granted for an employee at work 23 feet above the ground who was struck by lightning, on the theory that his employment increased the risk from lightning; while in *Netherton v. Lightning Delivery Co.*, 32 Ariz. 350, 258 Pac. 306, compensation was denied for death of an employee who had to drive his employer's truck from an altitude of 1,100 ft. to one of 5,000 ft. The court remarked that the risk was not increased by reason of his employment. In *Aetna Ins. Co. v. Ind. Comm.*, 81 Colo. 233, 254 Pac. 995, the decedent had to drive his employer's team of horses over a high rocky hill, near a wire fence. Compensation was allowed for his death, the court finding that his employment required him to be in a position where the lightning struck him, that there was a casual relation between the employment and the accident, so that the latter may be said to have arisen out of the former. But where the decedent was operating a steel road grader during a storm, as his employment required him to do, compensation was denied. *Wiggins v. Ind. Accid. Board*, 54 Mont. 335, 170 Pac. 9. In seven cases that are reported the workmen of their own volition or at the suggestion of foremen, sought shelter from the storm; in one case the man went to the company tent; in two instances they went to barns; in the other four cases they went under trees. Compensation was denied in the first three cases (*Griffith v. Cole*, 183 Iowa 415, 165 N. W. 577; *Thier v. Widdifield*, 210 Mich. 355, 178 N. W. 16; *Klawinski v. L. S. & M. S. R. R.*, 185 Mich. 643, 152 N. W. 213); but, as distinguished from the principal case, it was granted in every case where the workman sought shelter under a tree. (*State ex rel. etc. v. District Ct.*, 129 Minn. 502, 153 N. W. 119; *DeLuca v. Park Comm.*, 94 Conn. 7, 107 Atl. 611; *Madura v. City of N. Y.*, 238 N. Y. 214, 114 N. E. 505; *Gasca v. Pipe Line Co.*, 2 La. App. 483). In several of these cases the court referred to the fact that a wet tree is a ready conductor of electricity, and that one under it is exposed to greater danger, seeming thereby to imply that the compensation is granted because

of the increased danger to which the workman was subjected by being under the tree; that had he remained in the open at his work where the danger was no greater than that to which the general public was subjected, he would not have recovered. But the decision of the Appellate Court of Indiana is not subject to the criticism of making such an "incongruous distinction which penalizes a workman for going on with his work and puts a premium on his scampering off to find a tree where he is exposed to greater risk of being killed" "Lightning Cases" under the Workmen's Compensation Acts, 26 *Mich. Law. Rev.*, 307.

The test laid down by the Colorado court for recovery is that "where one in the course of his employment is *reasonably required* to be at the particular place at the particular time, and there meets with accident, such accident arises out of the employment, though any other person at such place would have met with such accident irrespective of employment." *Aetna Life Ins. Co. v. Indiana Comm., supra*. This test would cover the present case, for it could scarcely be contended that his employment "reasonably required" Deckard to seek shelter under a tree where it is well known that the danger of being struck by lightning is greater. Moreover, "while the workmen's compensation law . . . is liberal in the highest degree in protecting those coming within its purview against industrial accidents, it is not intended to provide general insurance against death or injury under all conditions." *Netherton v. Lightning Delivery Co., supra*.

J. W. S.