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Workmen's Compensation Act -- Accidents Arising Out of and In the Course of the Employment -- Street Risks -- Dual Employment

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that as between plaintiff and defendant oil company, assumption of risk by plaintiff's intestate was not available as a defense because there was no contractual relation between the parties.

Thus it is seen that the court's statement in the principal case is in accord with previous North Carolina decisions. But in confining the doctrine of assumption of risk as a separate defense to contract cases and master and servant relationships, while in all other areas considering it as a phase of contributory negligence, North Carolina does not follow the general trend of American decisions.

· NAOMI E. MORRIS

Workmen's Compensation Act—Accidents Arising Out of and In the Course of the Employment—Street Risks—Dual Employment

Deceased was employed by the city as cemetery caretaker-salesman. In addition he was allowed to take private employment as a sexton. In this dual capacity he regularly visited local funeral homes to solicit business. On one such trip, while crossing the street, he was struck by an automobile and killed. In awarding compensation the Commission concluded that death resulted from an accidental injury which arose out of and in the course of the employment. The Supreme Court, in a unanimous decision, affirmed, stating that the Commission was correct in its determination that while decedent was paid by others for digging graves, this was related to his general duties as "caretaker," and the employee status, as distinguished from that of an independent contractor, was properly established.¹

The heart of North Carolina's Workmen's Compensation Act is expressed in the formula "arising out of and in the course of the employment."² In interpreting this section our court holds that (1) "in the course of employment" relates to the time, place, and circumstances under which the accidental injury occurs, and (2) "arising out of the employment" refers to the origin or the cause of the injury.³ This formula has kept the Act within the limits of its intended scope of providing compensation benefits for industrial injuries rather than "branching out into the field of general health insurance."⁴ The Act is to be liberally construed to effectuate the legislative intent and no strained nor technical construction should be given to defeat this purpose.⁵ Whether or not an accident arose out of the employment is

¹ *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. 2d 220 (1954).

² N. C. GEN. STAT. § 97-2 (f) (1950).

³ *Sweatt v. Board of Education*, 237 N. C. 653, 75 S. E. 2d 738 (1953); *Withers v. Black*, 230 N. C. 428, 53 S. E. 2d 668 (1949); *Walker v. Wilkins, Inc.*, 212 N. C. 627, 194 S. E. 89 (1937); *Davis v. North State Veneer Corp.*, 200 N. C. 263, 156 S. E. 859 (1931).

⁴ *Duncan v. Charlotte*, 234 N. C. 86, 91, 66 S. E. 2d 22, 25 (1951).

⁵ *Johnson v. Hosiery Co.*, 199 N. C. 38, 155 S. E. 728 (1930). But as pointed

a mixed question of law and fact⁶ and when supported by competent evidence, the findings of fact by the Industrial Commission, on a claim properly constituted under the Act, are conclusive on appeal.⁷

The court early recognized the necessity of interpreting and applying the above formula largely on the facts of each particular case and that general definitions excluding or embracing certain acts as causative factors within its terms would be unsatisfactory.⁸ Three years after the adoption of the Act one writer concluded that "with few exceptions, the North Carolina cases have reflected a disposition toward a liberal construction of the section 'arising out of and in the course of employment,' but not a disposition toward the 'radically liberal' attitude adopted by some jurisdictions."⁹ It is the purpose of this note to determine if this liberal trend of interpretation has continued.

In the principal case the court established the causal relation of the accident to the employment to bring it within the statutory formula "arising out of and in the course of the employment," found the employee status properly established, and affirmed the findings of the Commission that "when as an incident of the employment and in the performance of a duty connected with it, as shown by the established custom, the decedent crossed the street enroute to a funeral home, the hazard of the journey may properly be regarded as within the scope of the Act."¹⁰

A difference of opinion arises in the application of the formula "arising out of and in the course of the employment" to embrace a fatal accident in the street as a hazard of the employment.¹¹ Many states

out by Justice Barnhill in *Hayes v. Elon College*, 224 N. C. 11, 29 S. E. 2d 137 (1944): "This rule is . . . one, benefiting the injured party only in those cases where the act applies. It cannot be invoked to determine when the Act does apply. The doctrine of liberal construction arises out of the Act itself, and relates to cases falling within the purview of the Act. Until it is adjudicated affirmatively that the employer-employee relationship existed at the time of the accident no interpretation of the Act—liberal or otherwise—comes within the scope of judicial inquiry." *Ibid*, p. 19.

⁶ *Matthews v. Carolina Standard Corp.*, 232 N. C. 229, 60 S. E. 2d 93 (1950).

⁷ *Fox v. Mills, Inc.*, 225 N. C. 580, 35 S. E. 2d 869 (1945).

⁸ *Harden v. Thomasville Furniture Co.*, 199 N. C. 733, 155 S. E. 728 (1930).

⁹ Note, 10 N. C. L. Rev. 373 (1932).

¹⁰ "The usual test for determining whether the relationship between the parties is that of employer and employee or independent contractor is whether the employer has the right to control the workmen with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material or determinative of the relationship whether the employer actually exercises the right to control." *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. 2d 220 (1954). This test was earlier set out in *Hayes v. Elon College*, 224 N. C. 11, 29 S. E. 2d 137 (1934). The result in the *Hinkle* case is not surprising even though it is quite plausible that when he was killed he was en route in his capacity as an independent contractor. Neither the Commission nor the Court seem to have considered as decisive that this trip may have been made solely in pursuance of his duties as "lot salesman."

¹¹ *J. E. Porter Co. v. Industrial Commission*, 301 Ill. 76, 133 N. E. 652 (1922); *Capital Paper Co. v. Conner*, 81 Ind. App. 545, 144 N. E. 474 (1924); *Hinkle v.*

refuse compensation for injuries incurred from "street risks" on the theory that an injury to an employee while using the street does not arise out of the employment *for the risk of such injuries are common to everyone using the streets and are not peculiar to the employment* (Italics supplied).¹² North Carolina appeared to be in this category when, in 1938,¹³ the court reversed the lower court and re-instated the findings of the Commission that where the street risk was common to all the neighborhood and was not incidental to the employment it did not arise out of the employment.¹⁴ Evidence was that employee, who worked irregularly, had gone to the employer's plant to do a job. As he was leaving he was called to the aid of the night watchman. In crossing the street to aid the watchman he slipped on a fruit peel and was injured. There is prior authority, however, for the rule that an employee may recover where he suffered a street injury when as part of

Lexington, 239 N. C. 105, 79 S. E. 2d 220 (1954) (apply the formula) : Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325 (1915) (refuse to apply the formula). For a more complete discussion of street risks see Horowitz, WORKMEN'S COMPENSATION (1944) 95-99.

¹² Note, 23 N. C. L. REV. 159 (1945).

¹³ Lochey v. Cohen, Goldman & Co., 213 N. C. 356, 196 S. E. 342 (1938).

¹⁴ Somewhat analogous to the street risk cases are those which involve so called "Acts of God." It is universally held that injury due to lightning, windstorms, earthquake, freezing, sunstroke, and exposure to contagious disease arise out of the employment if the employment increases the risk of this particular harm. Some courts accept a showing that the risk was an actual risk of the particular employment regardless of whether it is greater or less than that of the general public. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 51 (1952). An exception to the rule that the employment must increase the risk is the holding that if the harm, though initiated by an act of God, takes effect through contact of the employee with any part of the premises, the causal connection with the employment is shown. Caswell's Case, 305 Mass. 500, 26 N. E. 2d 328 (1940). The reasoning that the particular risk encountered was not peculiar to the employment has led to illogical results. Netherton v. Lightning Delivery Co., 32 Ariz. 350, 258 Pac. 306 (1927) (the presence of a driver on a high hill rejected as a showing of any special risk when he was struck by lightning while making a delivery). Generally, however, courts take judicial notice that lightning is attracted to high places and structures. Trucks Ins. Exchange v. Ind. Acc. Comm., 77 Cal. App. 2d 461, 175 P. 2d 884 (1947). Another case refused compensation where a workman froze his hands while shoveling snow. The court stated that he was not, by reason of his occupation, exposed to a special or peculiar danger from freezing greater than that shared by other persons in the same locality. Consumers Co. v. Industrial Commission, 324 Ill. 152, 154 N. E. 423 (1926). The obvious answer is that the general public is not out shoveling snow in twenty degree below weather. "The very work which the deceased was doing . . . exposed him to a greater hazard from heat stroke than the general public was exposed to for the simple reason that the general public were (*sic*) not pushing wheelbarrow loads of sand in the hot sun on that day." American Gen. Insur. Co. v. Webster, 118 S. W. 2d 1082 (Tex. Civ. App. 1938).

The majority of courts have discarded the "peculiar or increased risk" doctrine, and have substituted either the "actual risk" doctrine where the test is, was the injury a risk of the employment, or the "position risk" doctrine adopted by a few courts, that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed him in the position where he was injured. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 43 (1952).

his employment, he was sent for material with which to work.¹⁵ In at least two cases¹⁶ the Commission has arrived at a conclusion contra to that of the *Lochey* case and allowed recovery where the employee received a street injury, when his employment required his presence in the street.¹⁷

Ostensibly, then, North Carolina is in accord with the majority rule that if the employment occasions the employee's use of the street, the risks of the street are the risks of the employment and it is immaterial whether the nature of the employment involves continuous or only occasional exposure to its dangers.¹⁸ Whether North Carolina will go so far as to adopt the "position risk" doctrine, that an injury arises out of the employment if it would not have occurred but for the fact that the condition and obligation of the employment placed the claimant in the position where he was injured, is doubtful. This doctrine seems but a refinement of the "but for" rule which is inconsistent with the requirement of a causal relation between the employment and the injury, and which is almost universally rejected.¹⁹

Recent cases²⁰ indicate that North Carolina, in accord with the majority,²¹ will resist the expansion of the Compensation Act into the general field of health insurance by re-emphasizing the necessity for a clear showing of a causal relation between the work and the injury. Thus, in *Sweatt v. Board of Education*,²² the court reversed the Commission's grant of compensation where the deceased had served both as principal of a public school and as superintendent of an adjacent orphanage, and was killed by a resident of the orphanage who was also

¹⁵ *Massey v. Board of Education*, 204 N. C. 193, 167 S. E. 2d 695 (1933). Evidence showing that deceased, a janitor, when sent to purchase cleaning materials was struck and killed while crossing the street, held sufficient to show that the injury was from an accident arising out of and in the course of the employment.

¹⁶ *Clinton v. Shuford National Bank*, 9304 (Workmen's Compensation Case) (Sept. 1940). Employee enroute to pick up mail slipped on oil on the street. Recovery allowed. *Accord*, *Walker v. Piedmont Publishing Co.* (Nov. 1940).

¹⁷ The expansion of the "street risk" doctrine is perhaps well justified when we consider the dangers of a city street as depicted by the New York Court of Appeals. See, *Matter of Katz v. Kadans & Co.*, 232 N. Y. 420, 134 N. E. 330 (1922).

¹⁸ 1 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 77 (1952).

¹⁹ *Ibid.*, p. 43.

²⁰ *Sweatt v. Board of Education*, 237 N. C. 653, 75 S. E. 2d 738 (1953); and *Duncan v. Charlotte*, 234 N. C. 86, 66 S. E. 2d 22 (1951). In the latter case, deceased, a member of the city fire department, died of a coronary occlusion while on his annual vacation. The Commission awarded compensation on the basis of a 1949 amendment which included certain diseases within coverage of the Act as to active members of a fire department. Reversed by the court as repugnant to Article 1, sect. 7 of the North Carolina Constitution which forbids conferring exclusive or special emoluments on certain men or groups of men.

²¹ Larson points out that 41 states require a clear showing that the injury is within the formula "arising out of and in the course of the employment" to be compensable. *THE LAW OF WORKMEN'S COMPENSATION* 41 (1952).

²² 237 N. C. 653, 75 S. E. 2d 738 (1953).

a student of the public school, after deceased had reprimanded him for violation of orphanage rules. The court denied compensation, even though the reprimand was administered by the principal while conducting study hall in the school, and he was killed while sitting at his desk making out school reports. In reversing, the court determined that deceased had not reprimanded the boy in his capacity as principal but in his capacity as superintendent of the orphanage.²³ It is patent from the record that the death of deceased occurred in the course of his employment, but the essential element of causation is lacking. It appears, then, that where claimant was serving in a dual capacity North Carolina requires a clearer showing of a causal relationship between the injury and the particular employment from which he seeks compensation.²⁴ Had the "position risk" doctrine been adopted in *Sweatt v. Board of Education*²⁵ compensation would have been allowed, for the obligation of the employment placed the deceased in his general supervisory position in the school that night and it was in that position and in that place that he was killed.

In effectuating the intent of the legislature a court is justified in refusing to adopt such doctrines as that of "position risk" and in requiring a clear showing of a causal relation. In carrying out this intent a well balanced concept of the nature of Workmen's Compensation is indispensable to a proper understanding of current cases and to a proper interpretation of the Act. One author²⁶ has observed that almost every major error that can be noted in the development of the compensation law, whether judicial or legislative, can be traced either to im-

²³ The findings of the Commission were that "as principal, deceased reprimanded the student for a violation of the rules . . . The student, as a result of the reprimand, became angry, obtained a gun and killed Sweatt. The rule violated was formulated by the orphanage. This, however, is of no importance. The reprimand was administered by the deceased as principal of Union Mills High School to a student in that school. It cannot be said that in administering the reprimand the deceased went beyond his employment as principal. The deceased came to his death as a result of an injury by accident arising out of and in the course of his employment by the defendants as principal of the Union Mills High School." *Ibid* at 655. However, the Supreme Court determined that the record was insufficient as a matter of law to sustain the finding of the Commission.

²⁴ Deceased served as deputy, employed by the sheriff, and as jailer, employed by the county. Compensation was denied when it was shown that he was killed while trying to make an arrest two doors from the rear of the jail. *Gowens v. Alamance County*, 216 N. C. 107, 3 S. E. 2d 339 (1939). (The Act did not then treat deputies as employees of the county). Earlier, in *Gowens v. Alamance County*, 214 N. C. 18, 197 S. E. 538 (1938), the Supreme Court had remanded the case to the Commission for a finding specifically whether the injury was in the course of his employment as jailer. The Commission had determined that the injury was within the scope of his employment. The court overruled this finding and concluded that the attempted arrest was clearly outside the scope of his employment as jailer.

²⁵ 237 N. C. 635, 75 S. E. 2d 738 (1953).

²⁶ I LARSON, *THE LAW OF WORKMEN'S COMPENSATION* (1952).

portation of tort ideas and the concept of proximate cause,²⁷ or the attempt to compare with general health insurance and the failure to appreciate the social policy expressed by the enactment of the Act.

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most dignified and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.²⁸

One may conclude today that the North Carolina court's interpretation of the formula "arising out of and in the course of the employment" and its attitude in applying the Act is a continuation of that earlier found to exist: "a disposition toward a liberal construction but not toward the radically liberal attitude adopted by some jurisdictions."²⁹ The result of the *Hinkle* decision is again indicative that the court is effectively carrying out the policy of the legislature in its interpretation of the Workmen's Compensation Act.

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²⁷ In the *Lochey* case, *supra*, the court said the injury must be traced to the employment as a contributing proximate cause. This test is said to be obsolete. "But the requirement of proximate or legal cause is out of place in compensation law . . . Arising out of the employment does not mean exactly the same thing as legally caused by the employment. It is true, as many courts have said, that 'arising' has something to do with causal connection; but . . . when you speak of an event arising out of the employment the . . . moving force is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion . . . In tort law the beginning point is always a person's act, and the act causes certain consequences. In Workmen's Compensation law, the beginning is not an act at all; it is a relation, or condition, or situation—namely, employment . . . Finally, 'proximate cause' or 'legal cause' is out of place in compensation law because . . . it is a concept which is in itself thoroughly suffused with the idea of fault . . . The primary test of 'legal' or 'proximate cause' . . . is foreseeability, which is the 'fundamental basis of the law of negligence' . . . There is nothing in the theory of compensation liability which cares whether the employer foresaw particular kinds of harm or not. . . ." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION pp. 45-47 (1952).

²⁸ *Ibid*, at p. 5.

²⁹ *Nemeth v. University of Denver*, — Colo. —, 257 P. 2d 423 (1953). This is an example of what might be called the "radically liberal attitude adopted by some jurisdictions." Claimant, a student regularly enrolled in the University, was granted compensation for an injury suffered in football. The court found that he was an employee of the University as a result of his employment in jobs on the campus which were dependent on his playing football. "In the instant case the employment . . . so far as Nemeth was concerned, was dependent on his playing football. Under the record the Commission and the District Court may have properly concluded as they did determine that Nemeth was an employee of the University and sustained an accidental injury arising out of and in the course of his employment." *Ibid*, p. 427. This does not seem an unreasonable conclusion.