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Workmen's Compensation—Rights of Claimant Whose Injuries Were the Result of "Horseplay"

Claimant sought to recover under the Workmen's Compensation Act for injuries sustained in a fall at the plant of his employer. While walking from his working place to a water cooler through a common passageway, which had resilient wire mesh stacked on the floor, claimant paused, jumped upward about two and a half feet, and in attempting to make a complete turn in the air in an upright position, fell to the floor. The state compensation commissioner held the injuries of the claimant were received in the course of, and resulted from, his employment, and thus compensable. *Held*, affirmed. Claimant's momentary and impulsive act while on the way to the water cooler was such a slight deviation from his duties that it does not remove the employee from the course of his employment and therefore the injuries are compensable. *Shapaka v. State Compensation Comm'r*, 119 S.E.2d 821 (W. Va. 1961).

This is the first determination by the West Virginia Supreme Court of Appeals of the rights of a claimant under the Workmen's Compensation Act who has suffered injuries resulting from skylarking or horseplay. Holdings in other jurisdictions indicate that these so-called "horseplay" cases are becoming an increasingly important source of litigation.

The general rule is that compensation is not recoverable under workmen's compensation acts for injuries sustained from horseplay which constitutes a departure from, or abandonment of, the employment. ANNOT., 159 A.L.R. 319 (1945). However, courts are not uniform with regard to what acts of horseplay constitute such an abandonment.

In determining whether a particular act does constitute a departure from the employment, the courts must necessarily interpret the applicable statutes. The West Virginia statute provides that compensation shall be granted to those employees who receive personal injuries "in the course of and resulting from their employment." W. VA. CODE ch. 23, art. 4, § 1 (Michie 1955). The language of the West Virginia statute is substantially similar to the statutes in the majority of other jurisdictions.

The courts, in interpreting these statutes, have been reluctant to permit recover in "horseplay" cases. *Hazelwood v. Standard Sanitary Mfg. Co.*, 208 Ky. 618, 271 S.W. 687 (1925); *Lee's Case*,

240 Mass. 475, 134 N.E. 268 (1922); *In re Moore*, 225 Mass. 258, 114 N.E. 204 (1916). In later decisions the courts have been veering from this interpretation. Various exceptions have begun to spring up. A notable early example is *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

Today, nonparticipants or innocent victims, injured as a result of the horseplay of others, are considered by most courts to have suffered compensable injuries under workmen's compensation acts. 1 LARSON, *WORKMEN'S COMPENSATION* § 23.10 (1952). *Socha v. Cudahy Packing Co.*, 105 Neb. 69, 181 N.W. 706 (1921), is a leading early decision granting recovery to a nonparticipant. In a California case the court granted recovery to a nonparticipant, and in so doing, reversed a ruling which had been in effect for thirty years in that state. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 26 Cal.2d 286, 158 P.2d 9 (1945).

A more controversial issue, however, is whether or not a participant in horseplay should be permitted to recover. This issue has been the subject of greatly divergent treatment by the various jurisdictions. Schneider states that there is a modern trend to permit recovery in such cases. 6 SCHNEIDER, *WORKMEN'S COMPENSATION* § 1609 (3d ed. 1948). This statement is not meant to include those situations in which the participant stepped aside from his employment to engage in the horseplay; it merely indicates that the trend is not to regard participation in horseplay as abandonment of the employment per se.

However, it is a long standing rule in many jurisdictions that the instigation of, or participation in, horseplay precludes any recovery under a workmen's compensation act. This "aggressor defense" rule has been applied extensively. *Ackerman v. Cardillo*, 140 F.2d 348 (D.C. Cir. 1944); *Di Lauro v. Bassetti*, 133 Conn. 642, 53 A.2d 512 (1947); *In re Moore*, *supra*.

There are now four generally accepted exceptions to the "aggressor defense" rule: (1) where horseplay is customary, and is permitted to continue by the employer; (2) where misuse of dangerous implements was within the contemplation of the employer; (3) where the horseplay was not the decisive factor causing the injury; and (4) where there are crowded conditions in the working area. 6 SCHNEIDER, *WORKMEN'S COMPENSATION* §§ 1612-1615 (3d ed. 1948).

Leonbruno v. Champlain Silk Mills, supra, permitted recovery by a nonparticipant because the horseplay from which the claimant received his injury was common practice in the plant. In a later case, this exception was extended to cover participants. *Industrial Comm'r v. McCarthy*, 295 N.Y. 443, 68 N.E.2d 434 (1946). In that case the court stated that the long continuing custom of horseplay indicates that there was no abandonment of employment.

A newer theory of dealing with the problem of recovery under workmen's compensation in horseplay cases is that suggested by Larson. He suggests that recovery should be based upon application of the "course of employment" and "arising out of the employment" standards in determining whether the horseplay was a sufficient deviation from the duties of employment to constitute an abandonment thereof. If, in applying these standards, no abandonment is found, then recovery should be allowed. 1 LARSON, WORKMEN'S COMPENSATION § 23.60 (1952).

In a recent case of first impression, the Supreme Court of Florida apparently followed Larson's suggestion. The claimant, who was entertaining his employer's customers on a fishing trip, sustained an eye injury when a firecracker, which he had lit, exploded. The court, in permitting recovery under the Workmen's Compensation Act, said, "The right to compensation turns on the question of deviation solely, . . ." *Boyd v. Florida Mattress Factory, Inc.*, 128 So. 2d 881 (Fla. 1961).

The West Virginia court, in the instant case, evidently used a test similar to that described by Larson. The court said that whether the claimant's actions amounted to horseplay ". . . need not be and is not determined in this proceeding." 119 S.E.2d at 824. In making this statement, the court thereby gave emphasis to the fact that it was not using the "aggressor defense" rule or the exceptions thereto, but, instead, was deciding the case on the basis of the extent of the deviation.

Since it is generally conceded by all courts that the compensation acts were intended to eliminate the employee's fault as a basis for denying recovery, and should receive a liberal construction in favor of the workman, it would appear that the extent of the deviation test is a better means to implement the intentions of these acts than the "aggressor defense" rule and its various exceptions. This is because the extent of the deviation test permits determination of whether there was, in fact, an injury suffered in the course of

and resulting from the employment without the hindrance of strict rules which might prevent a true determination of whether or not there was an actual abandonment of employment. Of course, the result is a determination of each case on its own peculiar facts, but this would seem to be the intent of the broadly-worded workmen's compensation acts.

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ABSTRACTS

Criminal Law—Conspiracy—Defendant Has Absolute Right to Separate Trial

D was indicted with five others for conspiracy to commit murder. The trial court overruled his motion for severance, and a writ of prohibition was brought on his behalf. *Held*, writ awarded. A defendant jointly indicted for a felony has the absolute right to elect a separate trial. *State ex rel. Zirk v. Muntzing*, 120 S.E.2d 260 (W. Va. 1961).

At common law severance by either the defendants or the state was a matter of judicial discretion. This rule was modified by the legislature, and the instant case is the first to explicitly interpret the statute, where a defendant's right to separate trial is at issue. W. VA. CODE ch. 62, art. 3, § 8 (Michie 1955). The statute provides that joint defendants must agree on which jurors to strike or the prosecuting attorney will strike for them to reduce the panel to twelve. But if the defendants "elect to be, or are, separately tried . . ." the normal procedure for striking shall be followed. The attorney general contended that taking the statute as a whole, it did not grant an unqualified right to elect a separate trial.

Another statute could have a bearing on the matter of severance in conspiracy cases. Persons who conspire and attempt to inflict injury on another may be indicted for a felony under the provisions of the "Red Men's" statute. W. VA. CODE ch. 61, art. 6, § 7 (Michie 1955). The prosecution may indict the accused either jointly or severally. It is arguable that if the state has the choice of how it may indict, then the defendants can not have the choice of how