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Workmen's Compensation - Injuries Arising out of Employment - Right of Traveling Employee to Compensation

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one in the instant case appear to have created an artificial and unreasonable distinction. This distinction has caused most states to hold that the provisions of the statutes cannot constitutionally extend to accidents involving nonresidents, who after having entered the state proceed onto private or other public property and there cause injury to another.

This case illustrates the importance of careful drafting of the Nonresident Motorist Statue. To restrict the inherent danger of a motor vehicle solely to the highway as was done in this case denies the resident proper protection and seems to defeat the intent of the lawmakers.

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WORKMEN'S COMPENSATION — INJURIES ARISING "OUT OF" EMPLOYMENT — RIGHT OF TRAVELING EMPLOYEE TO COMPENSATION. — Decedent and a female companion died in a hotel fire caused by the careless smoking of one or both of the parties. Decedent had been traveling on the business of his employer. The petitioners, decedent's wife and minor daughter, filed a claim under the California Workmen's Compensation Act which was denied by the state Industrial Accident Commission. The California Supreme Court, two justices dissenting, *held* that the death arose out of and in the course of employment and thus was compensable under the act. *Wiseman v. Industrial Accident Commission*, 46 Cal.2d 570, 297 P.2d 649 (1956).

The courts generally agree that the provisions of the Workmen's Compensation Acts should be given broad construction,[1] and reasonable doubts resolved in favor of the employee.[2] Recovery is limited to injuries arising out of and in the course of employment.[3] The former relates to a causal connection between the accident and the employment, and the latter refers to the "time, place, and circumstances" of the accident.[4]

1. *E. g.*, Desautel v. North Dakota Workmen's Compensation Bureau, 72 N. D. 35, 38, 4 N.W.2d 581, 583 (1942) (dictum).

2. *E. g.*, Truck Ins. Exchange v. Industrial Acc. Comm'n., 27 Cal.2d 813, 167 P.2d 705, 706 (1946) (dictum); Smith v. University of Idaho, 67 Idaho 22, 170 P.2d 404, 406 (1946) (dictum).

3. 6 Schneider, *Workmen's Compensation* § 1542 (3rd ed. 1948). Forty-one states have statutes containing both phrases. N. Dak., Penn., Texas, and Wash. statutes contain only "in the course of". N. D. Rev. Code § 65-0102, 8 (Supp. 1953) " 'Injury' shall mean only an injury arising in the course of employment." N. Dak. law contains no other equivalent of "arising out of" the employment as regards accidental injuries and only the single element must be found to award recovery. Lippman v. North Dakota Workmen's Compensation Bureau, 79 N. D. 248, 55 N.W.2d 453 (1952).

4. *E.g.*, Lippman v. North Dakota Workmen's Compensation Bureau, 79 N.D. 248, 252, 55 N.W.2d 453, 458 (1952) (dictum).

The most controversy centers around the application of the phrase "arising out of" the employment. The more liberal jurisdictions, as represented by this case, require only that the employment be a contributing cause leading to the injury.[5] Under this theory so long as the necessity for a trip is created by the traveler's employment, his engagement in personal activities incidental thereto will not remove him from coverage under the act.[6] A traveling employee would be put at his own risk only by deliberate violation of rules or statutes designed for his protection,[7] willful self-inflicted injury,[8] or such substantial deviation from the employment as to make the trip primarily personal in nature.[9]

Many jurisdictions have adopted a more conservative view. They reason that the legislatures did not intend to establish a general health and accident insurance fund to cover any injury which might befall an employee, and have required a much stronger causal relationship between the accident and the employment.[10] Thus under the "foreseeability" doctrine the causal relationship between the injury and a hazard of the employment must have been foreseeable at the time the contract of employment was undertaken.[11] The "increased risk" doctrine requires that the injury flow from a hazard which is an "increased risk" of the employment, and not one to which the public in general is exposed.[12] These doctrines deny recovery for accidents which may occur in the normal course of liv-

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5. Cudahy Packing Co. v. Parramore, 263 U. S. 418 (1923); Employer's Mut. Liability Ins. Co. v. Industrial Acc. Comm'n., 41 Cal.2d 676, 263 P.2d 4 (1953); Gletman v. Reliable Linen & Supply Co., 128 N. J. L. 443, 25 A.2d 894 (Ct. Ern. & App. 1942).

6. *E. g.*, Mark's Dependents v. Grey, 251 N. Y. 90, 167 N.E. 181, 183 (1929) (dictum). Opinion by Justice Cardoza in what is considered a leading case on point.

7. See Brown v. Birmingham Nurseries, 173 Tenn. 343, 117 S.W.2d 739 (1938); Carbon Fuel Co. v. State Compensation Comm'r., 112 W. Va. 203, 164 S.E. 27 (1932); 1 Larson, *Workmen's Compensation* § 32 (192).

8. Provision contained in statutes of 41 states. N. D. Rev. Code § 65-0102, 8 (Supp. 1953). " 'Injury' . . . shall not include an injury caused by the employee's willful intention to injure himself." For a comprehensive discussion see, 1 Larson, *op. cit. supra* note 7, § 36.

9. See White v. South Carolina State Highway Dept., 226 S. C. 380, 85 S.E.2d 290 (1955) (deviation of 12 miles to take wife and child home held substantial in total trip of 38 miles).

10. See January-Wood Co. v. Schumacher, 231 Ky. 705, 22 S.W.2d 117 (1929); Permanent Constr. Co. v. Industrial Comm'n., 380 Ill. 47, 43 N.E.2d 557, 560 (1942) (dictum).

11. See United Disposal & Recovery Co. v. Industrial Comm'n., 291 Ill. 480, 126 N.E. 183 (1920); January-Wood Co. v. Schumacher, 231 Ky. 705, 22 S.W.2d 117 (1929); Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458 (Sup. Ct. 1913); Leonard v. Granberry Furnace Co., 150 Tenn. 346, 265 S.W. 543 (1924). This test is seldom used currently. *But see* Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 270 S.W.2d 389 (1954).

12. See Hill-Luthy Co. v. Industrial Comm'n., 411 Ill. 201, 103 N.E.2d 605 (1952); Permanent Constr. Co. v. Industrial Comm'n., 380 Ill. 47, 43 N.E.2d 557 (1942); Lexington Ry. System v. True, 276 Ky. 446, 124 S.W.2d 467 (1939); Nelson v. Country Club of Detroit, 329 Mich. 479, 45 N.W.2d 362 (1951).

ing,[13] while the same accidents might be covered in the liberal jurisdictions.[14]

It seems that the law governing recovery under Workmen's Compensation Acts would be made more realistic by abandoning the traditional tests applied by most courts and adopting the "positional risk" doctrine applied in *Lawrence v. Matthews*.[15] This doctrine requires only that the employment bring the employee to the place of the accident, and therefore allows a recovery in proper cases without the necessity of a strained interpretation of the traditional tests.

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13. Injuries held not compensable: Lexington Ry. System v. True, 276 Ky. 446, 124 S.W.2d 467 (1939) (stray bullet); Nelson v. Country Club of Detroit, 329 Mich. 479, 45 N.W.2d 362 (1951) (lightning); Jackson v. Clark & Fay Co., 197 Tenn. 135, 270 S.W.2d 389 (1954) (tornado).

14. Injuries held compensable: Pacific Indemnity Co. v. Industrial Acc. Comm'n, 86 Cal. App.2d 726, 195 P.2d 919 (1948) (stray bullet); Aetna Life Ins. Co. v. Industrial Comm'n., 81 Colo. 233, 254 Pac. 995 (1927) (lightning); Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942) (cyclone).

15. [1929] 1 K. B. 1 (C. A. 1928). This case is annotated in 63 A. L. R. 456. The test has been applied in several United States cases. Pacific Indemnity Co. v. Industrial Acc. Comm'n., 86 Cal. App.2d 726, 195 P.2d 919 (1948) (employee killed by random bullet); Aetna Life Ins. Co. v. Industrial Comm'n., 81 Colo. 233, 254 Pac. 995 (1927) (employee struck by lightning); Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942) (employee killed when cyclone blew down building in which he sought shelter); Gargiulo v. Gargiulo, 12 N. J. 607, 97 A.2d 593 (1953) (employee struck by stray arrow); Filitti v. Leorde Holmes Corp., 244 N. Y. 291, 155 N.E. 579 (1927) (employee struck by falling object); Gioliotti v. Hoffman Catering Co., 246 N. Y. 279, 158 N.E. 621 (1927) (employee killed in fire).