North Dakota Law Review

Volume 31 | Number 2 Article 13

1955

Workmen's Compensation - Acidents Arising out of Employment - Idiopathic Falls

Harold W. E. Anderson

sequential damages.[9] The opposite view is characterized by a Nebraska case holding that "when plaintiff returned shoes and received payment for the purchase price, it was an irrevocable election to rescind, and her statement that she would see the defendants later about her injuries was ineffectual to modify or disaffirm her election to rescind." [10]

The doctrine of election of remedies has been said to rest upon the principle "he who seeks equity must do equity".[11] In a United States Supreme Court decision it was stated that the doctrine of election of remedies was a harsh and largely obsolete rule, the scope of which should not be extended.[12] In the Uniform Commercial Code there is no mention of "election" of any sort.

Section 2-608 of the Uniform Commercial Code eliminates the requirement that the buyer must elect between rescission and recovery of damages for breach of warranty. The remedy under this section is simply referred to as "revocation of acceptance".[13] Under this principle the buyer may not only revoke passage of title but may also recover damages for non-delivery.[14] The measure of damages for non-delivery is "the difference between" the market price "at the time the buyer learned of the breach and the contract price together with incidental and consequential damages".[15] Incidental damages includes expenses incurred in the "handling of rejected goods" and consequential damages include "injury to person or property proximately resulting from any breach of warranty".[16] This would include the damages asked in the instant case.

In view of the materials discussed it appears that the mere return of defective goods purchased does not raise a conclusive presumption of an intended rescission which would prevent an action for damages.

ROY A. OLSON

WORKMEN'S COMPENSATION — ACCIDENTS "ARISING OUT OF EMPLOYMENT" — IDIOPATHIC FALLS. — Plaintiff, who suffered from epilepsy, was going about his customary duties in defendant's factory when he experienced a seizure which caused him to fall and strike his head on the concrete floor, thus incurring a cerebral concussion. The Division of Workmen's Compensation granted an award in favor of the claimant. On final appeal to the Supreme Court it was *held,* three justices dissenting, that the award be set aside. The concrete floor of the plant did not consti-

9. Bagwell v. Susman, 165 F.2d 412 (6th Cir. 1947).
10. Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N.W. 294, 296 (1929).
11. Peters v. Bain, 133 U.S. 670, 695 (1889).
12. Friederichsen v. Renard, 247 U.S. 207 (1918).
13. U.C.C. §2-608(1) (1952) "The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it."
14. *Id.* at §2-711(1) "Where . . . the buyer rightfully rejects or justifiably revokes acceptance . . . the buyer may . . . (b) recover damages for non-delivery . . ."
15. *Id.* at §2-713(1).
16. *Id.* at §2-715(1) "Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any damages from delay or otherwise resulting from the breach. (2) Consequential damages include (a) any loss resulting from general or particular requirements and needs of which the seller . . . had reason to know . . . (b) injury to person or property proximately resulting from any breach of warranty".

tute a hazard of employment which contributed to the accident. The risk to which the employee was subjected did not arise from the nature of the floor or its quality of "hardness", but was created solely by his peculiar affliction. *Henderson v. Celanese Corp.*, 108 A.2d 267 (N.J. 1954).

The jurisdictions are in general agreement that no injury[1] may be compensable unless it resulted from an accident[2] "arising out of and in the course of the employment."[3] To make the task of construction easier the expression has been divided[4]; the "arising out of" phrase referring to the causal origin,[5] and "course of employment" relating to time, place and circumstances of the accident in relation to the employment.[6] In the idiopathic fall cases the courts have had little difficulty in finding that the accidents arose in the course of employment; the problem has been whether the injury arose out of the employment.[7] Generally an injury arising out of the employment where there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.[8]

The courts have been almost unanimous in holding that an employee is not precluded from receiving compensation merely because the injury suffered is the aggravation or acceleration of a pre-existing disease or infirmity[9]; they do, however, require that the aggravation or acceleration must have arisen out of the employment under circumstaices which can be said to be accidental.[10] Illustrative of this is the case of an employee who has a dormant stomach cancer and because of over exertion in the course of his employment suffers an activation thereof.[11]

Recovery has been allowed in fall cases where an employee because of a pre-existing disease or physical weakness fell from a height,[12] or in falling

1. Under Workmen's Compensation Acts, "injury" is designated as "accident" to distinguish it from intentional injuries and injuries caused by disease. Gates v. Central City Opera House Ass'n, 107 Colo. 93, 108 P.2d 880 (1940).

2. "Accident", a word which in some form appears in most statutes, means an "unlooked for mishap or an untoward event which is not expected or designed." The requirement that the injury be accidental in character has been adopted either legislatively or judicially by all states except California, Iowa, Massachusetts and Rhode Island. The United States Employees Compensation Act also omits the requirement. 1 Larson, Workmen's Compensation Law §§37.09, 37.10 n.2 (1952).

3. The "arising out of and in the course of employment" phrase has been adopted by 41 states. North Dakota, (N.D. Rev. Code (1943) Title 65) Pennsylvania, Texas, Washington and the U.S. Employee's Compensation Act omitted the "arising out of" idea completely. The other three states have either variants of the term or have changed the wording to require that the injury arose out of *or* in the course of employment. 1 Larson, Workmen's Compensation Law §6.10 (1952).

4. 1 Larson, Workmen's Compensation Law §6.10 (1952).

5. Beh v. Breze, 2 N.J. 279, 66 A.2d 156 (1949); Geltman v. Reliable Linen & Supply Co., 128 N.J.L. 443, 25 A.2d 894 (1942).

6. Irwin Neisler & Co. v. Industrial Comm., 846 Ill. 89, 178 N.E. 357 (1931); Casey v. Hansen, 238 Ia. 62, 26 N.W.2d 50 (1947).

7. See New Amsterdam Casualty Co. v. Hoage, 62 F.2d 468 (D.C. Cir. 1932); United States Casualty Co. v. Richardson, 75 Ga. App. 496, 43 S.E.2d 793 (1947).

8. Prosser on Torts §69 (1940).

9. 1 Larson, Workmen's Compensation Law §12.20 (1952).

10. American Smelting & Refining Co. v. Industrial Comm., 59 Ariz. 87, 123 P.2d 163 (1942); Chicago & Alton Ry. Co. v. Industrial Comm., 310 Ill. 502, 142 N.E. 182 (1924); Hemphill v. Tremont Lumber Co., 209 La. 885, 24 So.2d 633 (1945); Mager v. State Workmen's Ins. Fund, 127 Pa. Super, 438, 193 Atl. 155 (1937).

11. Causey v. Kansas City Bridge Co., 191 So. 730 (La. App. 1939).

12. Robinson-Pettet Co. v. Workmen's Comp. Bd., 201 Ky. 719, 258 S.W. 318 (1924) (Compensation allowed where an employee was injured in fall from a ladder caused by tuberculosis of the spine); Milwaukee Electric Ry. & Light Co. v. Industrial Comm., 212 Wis. 227, 247 N.W. 841 (1933).

struck a bookcase,[13] motor box,[14] sawhorse[15] or a piece of machinery,[16] generally on the theory that the employment put the employee in a position increasing the dangerous effects of such a fall.

In cases of the instant type, where the employee has a pre-existing disease aggravated or accelerated in no way by the employment, and where the fall is due to the disease and results in striking the bare floor instead of an object incidental to his work, the courts are divided as to whether the injury is compensable. Those denying compensation do so on the theory that a floor presents no risk or hazard that is not encountered everywhere, by all members of the public.[17] Those allowing recovery do so on the theory that the hazard need not expose the employee to extraordinary risk; rather, the fact that the hazard is incidental to and growing out of the employment is sufficient for compensation.[18] One writer contends that the majority of the recent decisions allow recovery in level floor idiopathic cases.[19] A careful study of the decisions cited in support of this view, however, will show that many of these cases involve unexplained falls,[20] or that some factor peculiar to the employment contributed to the injury.[21]

"Why epileptics . . . falling on concrete floors, should be relegated to the charity scrap-heap, for fractured skulls caused by contacts with floors, while courts at the same time correctly make industry pay for such injuries if the contact is with a wooden stairway, or a box, etc., is hard to understand. It is a distinction without a difference, justified by no language in a remedial statute intended to widen, not decrease the rights of the injured workman." [22]

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13. Tavey v. Industrial Comm. of Utah, 106 Utah 489, 150 P.2d 379 (1944).
14. Varao's Case, 316 Mass. 363, 55 N.E.2d 451 (1944).
15. National Automobile & Cas. Ins. Co. v. Industrial Acc. Comm., 75 Cal. App. 2d 677, 171 P.2d 594 (1946).
16. Industrial Comm. v. Nelson, 127 Ohio St. 41, 186 N.E. 735 (1933).
17. Rozeck's Case, 294 Mass. 205, 200 N.E. 903 (1936); Stanfield v. Industrial Comm., 146 Ohio 583, 67 N.E.2d 446 (1946); Daub v. Industrial Comm., 57 N.E.2d 301 (Ohio App. 1943); Remington v. Louttit Laundry Co., 77 R.I. 210, 74 A.2d 442 (1950).
18. Savage v. St. Aeden's Church, 122 Conn. 343, 189 Atl. 599 (1937); Pollack v. Studebaker Corp., 97 N.E.2d 631 (Ind. App. 1951); Barlau v. M.M.P. Implement Co., 214 Minn. 564, 9 N.W.2d 6 (1943); General Ins. Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App. 1951).
19. Horovitz, Current Trends in Workmen's Compensation 651 (1947).
20. New Amsterdam Cas. Co. v. Hoage, 62 F.2d 468 (D.C.Cir. 1932) (unexplained fall); Savage v. St. Aeden's Church, 122 Conn. 343, 189 Atl. 599 (1937) (cause of fall unknown); Pollack v. Studebaker Corp., 230 Ind. 622, 97 N.E.2d 631 (1951) (unexplained fall); Barlau v. M.M.P. Implement Co., *supra* note 18 (unexplained fall); General Ins. Corp. v. Wickersham, *supra* note 18 (employee may have struck cigar counter as he fell). "It should be stressed . . . that the present question [idiopathic falls], although often discussed in the same breath with unexplained falls, is basically quite different, since in the unexplained-fall cases you begin with a completely neutral origin of the mishap while in the present question you begin with an origin which is admittedly personal and which therefore requires some definite and affirmative employment contribution to offset the *prima facie* showing of personal origin." 1 Larson, Workmen's Compensation Law §12.11 (1952).
21. Protecto Awning Shutter Co. v. Cline, 154 Fla. 30, 16 So.2d 342 (1944) (An old man, subject to fainting spells, fainted and fell to a concrete floor, fracturing his skull. The basis for recovery was that the employment increased the probability of injury. Had he been home the injury would have been less likely to happen); A. C. Lawrence Leather Co. v. Barnhill, 249 Ky. 437, 61 S.W.2d 1 (1933) (Employee after a day of stacking 200-lb. sacks became dizzy on his way to his car and fell, breaking his leg. Injury was caused by the conditions of the employment); Hall v. Doremus, 114 N.J.L. 47, 175 Atl. 369 (1934) (While working employee became sick and faint from watching a difficult delivery of a calf).
22. Horovitz, Current Trends in Workmen's Compensation 652 (1947).

Statements such as this sound very convincing in view of the fact that the purpose of a Workmen's Compensation Act is to increase the protection of employees against the hazards of industry.[23] However, one must not lose sight of the fact that the compensation act imposes strict liability on the employer but was not intended to make the employer an absolute insurer of the employee's safety, or to provide general health or accident insurance.[24] As one writer has said, "rules of law must, by their very nature, proceed by categories . . ." Lines must be drawn between what is compensable and what is not.[25] There must be some criterion for granting recovery and as the majority of jurisdictions are unwilling to accept the "hardness" of the floor as a factor in determining recovery,[26] a reasonable solution seems to be the retention of the distinction between level falls and falls into projecting objects which are incidental to the employment, or falls from heights.[27] In the latter two classes of falls the employment has placed the employee in a position which increased the danger created by his pre-existing disease. While it seems at first glance that there is some trend toward the granting of recovery in the level fall cases, the majority of the jurisdictions will not allow recovery unless the employment created or intensified the risk that arose from the natural cause.[28]

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23. Thompson v. J. A. Jones Const. Co., 199 S.C. 304, 19 S.E.2d 226 (1942).
24. Wade v. Pacific Coast Elevator Co., 64 Idaho 176, 129 P.2d 894 (1942); Muller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N.E. 1028 (1918); The whole theory and purpose of the Workmen's Compensation Act was to charge upon Industry as one of the necessary elements of cost in the production of goods, losses sustained by workmen in their employment. O'Brien v. Northern Pac. Ry. Co., 192 Wash. 55, 72 P.2d 602 (1937); It was never intended to make the Workmen's Compensation Law an accident insurance or health insurance measure. Booke v. Workmen's Comp. Bureau, 70 N.D. 714, 297 N.W. 779 (1941); *see* Prosser on Torts §69 (1940).
25. 1 Larson, Workmen's Compensation Law §12.14 (1952).
26. Andrews v. L. & S. Amusement Corp., 253 N.Y. 97, 170 N.E. 506 (1930); Cinmino's Case, 251 Mass. 158, 146 N.E. 245 (1925); See note 17 *supra*.
27. See 1 Larson, Workmen's Compensation Law, 166 (1952).
28. See notes 20, 21 and text material thereto.