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"Accidental Means" in Workmen's Compensation - Furlong v. O'hearne

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Comments and Casenotes

"Accidental Means" In Workmen's Compensation

Furlong v. O'Hearne[1]

The claimant, a rigger engaged in repair work on a vessel, strained his back while lifting heavy rotor pumps in the regular course of his employment. The strain aggravated a congenital spinal malformation, resulting in subsequent disability. He filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.[2] Since the claimant had been performing his usual routine tasks at the time of the injury, the Deputy Commissioner ruled that the claimant had failed to show an " 'accidental injury of a sudden, unusual and unexpected character, from strain or overexertion' ",[3] and denied an award for compensation.

On appeal, the District Court for the District of Maryland reversed and remanded for the passage of an order awarding compensation to the claimant. The Court, per Chief Judge Thomsen, rejected the approach followed by a substantial minority of jurisdictions to the effect that an "accidental injury"[4] must be caused by an "accidental means" or some unusual strain or condition not naturally and ordinarily incident to the employment,[5] and held, in accordance with the weight of authority,[6] that an "accidental result" will suffice.[7] Although the injury occurred

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[1] 144 F. Supp. 266 (D. Md. 1956), aff'd. *per curiam* 240 F. 2d 958 (4th Cir. 1957).

[2] 33 U. S. C. A. (1957) Secs. 901-950.

[3] *Supra*, n. 1, 268.

[4] Most states use the terms "accidental injury", or injury "by accident" in their Workmen's Compensation statutes. LARSON, THE LAW OF WORKMEN'S COMPENSATION (1952), §37.10; Workmen's Compensation Law Reporter, C. C. H. (1957), §§6001-6054.

[5] LARSON, *op. cit., ibid*, §38; 5 SCHNEIDER, WORKMEN'S COMPENSATION (Perm. Ed. 1946), §1446; Sinkiewicz v. Lee & Cady, 254 Mich. 218, 236 N. W. 784 (1931); Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1 (1945).

[6] LARSON, *op. cit., supra*, n. 4, §38; SCHNEIDER, *loc. cit., supra*, n. 5, §1446; Clover, Clayton & Co. v. Hughes, 1910 A. C. 242, 3 B. W. C. C. 775 (1910); Giguere v. E. B. & A. C. Whiting Co., 107 Vt. 151, 177 A. 313, 98 A. L. R. 196 (1935); Gilliland v. Ash Grove Lime & Cement Co., 104 Kan. 771, 180 P. 793 (1919). See the concurring opinion of Seawell, J., in Edwards v. Piedmont Pub. Co., 227 N. C. 184, 41 S. E. 2d 592, 594 (1947).

[7] The Court also ruled, following the almost universally adopted view, that even though the claimant was suffering from a pre-existing infirmity, the injury is still compensable where the infirmity or disease was aggravated or its effects accelerated by an accidental injury arising out of and in the course of the employment. See: 58 AM. JUR. 749, Workmen's Compensation, §247; Gas Equipment Corp. v. Baldwin, 152 Md. 321, 136 A. 644

while the employee was performing his normal routine tasks, and was not caused by any external force, slip or fall, it was nevertheless "accidental" since it was an unintended, unexpected and fortuitous result of the claimant's work.

The Court of Appeals of Maryland has taken a different view and, in construing Section 14 of Article 101,[8] has aligned itself with the minority approach. It is submitted that, whatever may have been the source of the "accidental means" doctrine in other jurisdictions, the rule in Maryland evolved through a compounding of judicial error. A careful analysis of the Maryland decisions would seem to indicate that an overreaching *dictum* in *Slacum v. Jolley*,[9] flatly applied to materially different factual situations presented in later cases, resulted in an overly fine and technical rule; the effect has been to remove a small but significant category of injuries from the protection of the Workmen's Compensation Law. The result seems wholly disconsonant with the broad remedial purpose of the statute.

In the *Slacum* case, an "auto-bus" driver became ill from the heat of the day in driving his regular route and died within a few days, apparently of heat prostration. The Court of Appeals, in denying a compensation award, held that there had been no "accidental injury", since the prostration was not shown to have been caused by "unusual and extraordinary conditions in the employment which cannot be regarded as naturally and ordinarily incident thereto."[10] The facts, the Court said, were insufficient to show that the conditions of the deceased's employment were different from those affecting the general public in the neighborhood.

The Court would seem to have gone too far. To be compensable under the Maryland statute, an injury must not only be "accidental", it must also "arise out of" the em-

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(1927); Geipe, Inc. v. Collett, 172 Md. 165, 190 A. 836, 109 A. L. R. 887 (1937).

Note that the Maryland statute now provides for an apportionment of the disability as between the pre-existing infirmity and the accident, and compensation is awarded only for the proportion of the disability attributable to the accident. 8 Md. Code (1957), Art. 101, §36(7). See: Cabell Con. Blk. Co. v. Yarborough, 192 Md. 360, 64 A. 2d 292 (1949); Bethlehem Steel Co. v. Ruff, 203 Md. 387, 101 A. 2d 218 (1953); and Bethlehem Steel Co. v. Munday, 212 Md. 214, 129 A. 2d 162 (1957).

[8] "Every employer . . . shall pay . . . compensation . . . for the disability or death of his employee resulting from an *accidental personal injury* sustained by the employee arising out of and in the course of his employment . . ." (Emphasis added.)

Now 8 Md. Code (1957), Art. 101, §15. See also: §67(6).

[9] 153 Md. 343, 138 A. 244 (1927).

[10] *Ibid*, 351.

ployment;[11] the two are separate and distinct requirements. The latter is a causal requirement: the injury must be caused by some factor or condition of the employment; if it results from something unconnected with the claimant's work or working conditions, the "arising out of" requirement is not met.[12]

A close analysis of the facts and opinion of the *Slacum* case seems to indicate that it was this latter requirement, and not the "accidental" requirement, which was the real basis of the Court's decision. Nothing in the evidence indicated that the requirements of his employment subjected the claimant to any greater heat than was suffered by the general public. There was no factor traceable to or "arising out of" the employment which caused the injury.[13] This would appear to be the crux of the Court's decision; but in erroneously addressing its overly broad *dictum* to the "accidental" requirement rather than to the "arising out of" requirement, the *Slacum* court unwittingly set the stage for a series of judicial misapplications of Judge Offut's language in the cases that followed.

Miskowiak v. Bethlehem Steel Co.[14] extended the *Slacum* rationale to a factual situation it was never intended or designed to cover. The deceased employee had worked in a steel mill for six years, removing metal bars from a series of furnaces which generated considerable heat. The work was always of a strenuous and arduous nature. At the close of a hot and humid day in April, he collapsed in pain and succumbed to heat prostration. The Court of Appeals was unable to meet the *Slacum* requirement that the prostration be caused by "unusual and extraordinary conditions in the employment . . . not naturally and ordinarily incident thereto." Since the nature of the

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[11] *Supra*, n. 8.

[12] "An injury 'arises out of' employment when, after consideration of all the facts and circumstances of the case, it is apparent to the rational mind that there was a causal connection between the conditions under which the work is required to be performed and the ensuing injury . . . [The Workmen's Compensation Act] should not be so construed as to allow compensation in any case in which the injury which is the basis of the claim cannot be attributed to some service or act in the employment or found to be reasonably incidental thereto, but ensues from a hazard to which the workman would have been equally exposed apart from his employment." Consol. Engineering Co. v. Feikin, 188 Md. 420, 425, 52 A. 2d 913 (1947).

[13] "These facts, separately or together, are insufficient to show that Jolley's condition was caused by his employment, or that the conditions of his employment were different from those affecting the general public in that neighborhood at that time, . . . [n]or can we assume from his physical condition alone that it was due to his employment." Slacum v. Jolley, 153 Md. 343, 352, 138 A. 244 (1927).

[14] 156 Md. 690, 145 A. 199 (1929).

job uniformly called for strenuous muscular exertion in the artificial heat generated by the furnaces, the Court found no unusual or extraordinary working conditions at the time of the injury and recovery was denied.

But unlike *Slacum*, the "arising out of" requirement or causal connection between the employment and the injury was clearly met in the *Miskowiak* situation; the prostration resulted not merely from the general heat of the day, but primarily from the intense heat thrown off by the furnaces and from the strenuous muscular exertion required by the job. It was rather the "accidental" requirement which faced the Court. Since the injury was a fortuitous unintended consequence of the employee's labor, the necessary "accidental" quality would appear to be adequately met.[15] But in flatly applying the *Slacum dictum* in statute-like fashion to a materially different factual situation, the *Miskowiak* court evolved that *dictum* into an "accidental means" requirement.[16] Recovery was denied on the ground that the employee had merely been performing his routine tasks under the normal conditions of his employment.

It is submitted that the legal consequence of this rationale is to impose a requirement of *assumption of risk* upon the employee who is injured in the normal routine of his daily work. The more strenuous and arduous the work and the conditions of the employment, the less likely the chance of recovery when those conditions result in an injury or illness. The *Miskowiak* case, by erroneously applying the *Slacum dictum* to the "accidental" requirement, thus resulted in a preservation of one of the very doctrines of the common law which the Workmen's Compensation Law was designed to abolish,[17] with its consequent harsh and inequitable results.

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[15] Ruling on a factual situation closely paralleling Miskowiak, Judge Parker, not bound by the Maryland state court decisions, rejected the Slacum *dictum:*

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute . . . says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute." Baltimore & O. R. Co. v. Clark, 59 F. 2d 595, 597 (4th Cir. 1932).

[16] "The employee had been engaged in the routine performance of his daily labor, and had completed his days work without receiving any injury by impact or contact, or as the result of an unusual muscular exertion or unexpected movement." *Supra*, n. 14, 695.

[17] Preamble to Md. Laws 1914, Ch. 800, p. 1429; 8 Md. Code (1957), Art. 101, §15; Tilghman Co. v. Conway, 150 Md. 525, 537, 133 A. 593 (1926); Baltimore Transit Co. v. State, 183 Md. 674, 677, 39 A. 2d 858 (1944); Hart v. Sealtest, 186 Md. 183, 193, 46 A. 2d 293 (1946).

The "accidental means" doctrine was extended from the limited heat prostration situation into the more significant "routine exertion" area in *Atlantic Coast Shipping Co. v. Stasiak,*[18] where a stevedore sustained a hernia while throwing tin plate to a fellow workman. Applying the *Slacum-Miskowiak* rationale, the Court denied recovery as a matter of law, since the claimant had been engaged in the ordinary routine work of a stevedore at the time of the injury.[19]

Again, the "arising out of" requirement was clearly satisfied, since the injury resulted from the work required of the employee. Applying an "accidental means" test to deny recovery in such a case seems technical[20] and unrealistic in view of the broad remedial purpose of the Workmen's Compensation Law.[21] That the employee must assume the risk inherent in the nature of his job is plainly evident in the factual result achieved.

Heil v. Linck[22] and *Jackson v. Ferree*[23] soon provided a firm foundation in Maryland law for the application of

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[18] 158 Md. 349, 148 A. 452 (1930).

[19] The Court cited the Slacum *dictum*, and held that similarly in this case, "there was no evidence that the injury was caused by any unusual strain or by any condition not incident to claimant's employment." *Ibid*, 351.

[20] If the hernia had resulted from a slight slip on the part of the claimant, the Court would have found no difficulty in awarding compensation. *Cf.* Coal Co. v. Chisholm, 163 Md. 49, 161 A. 276 (1932), where the claimant incurred a hernia while performing his routine duties in a coal mine. Noting that the Stasiak decision precluded recovery in such a situation for lack of an unusual strain or condition, the Court of Appeals held that testimony below that the employee had slipped provided sufficient evidence of an accident. *Quaere:* Whether this innocuous feature should provide a legal turning point, the presence or absence of which may determine the awarding of compensation?

[21] "The legislation is remedial in character, designed and intended to afford a measure of relief to employer and employee engaged in extra-hazardous work from the waste consequent upon injury and disability to workmen engaged therein by integrating such losses with the cost of production, and no narrow, technical, or quibbling construction of its language should be permitted to frustrate that intention, or hinder or embarrass the efficient operation of the law." Owners' Realty Co. v. Bailey, 153 Md. 274, 284, 138 A. 235 (1927).

Compare the more liberal decision in Construction Co. v. Griffith, 154 Md. 55, 139 A. 548 (1927), where the Court was apparently not confronted with the technical requirement of the then recent Slacum v. Jolley case.

[22] 170 Md. 640, 180 A. 555 (1936). A meat-cutter worked in refrigerated rooms for short periods during the working day. The shifts in temperature between the cooling rooms and the hot outside air proved too great a strain for his already weak heart. The Court of Appeals, following the Slacum, Miskowiak, and Stasiak cases, reversed a compensation award. Three of the eight judges dissented.

[23] 173 Md. 400, 196 A. 107 (1938). An automobile mechanic suffered a hernia while putting a rear wheel on a truck, when the wheel "stuck" and jarred him. Since he had merely been carrying out his customary duties, the Court of Appeals affirmed a directed verdict for the employer, following Heil v. Linck, *supra*, n. 22.

the misconceived "accidental means" doctrine to other routine exertion cases. The Court in *Beadle v. Bethlehem Steel Co.*,[24] confronted with facts almost identical to the *Miskowiak*[25] case, held for the employer as a matter of law. At least in retrospect, "assumption of risk" seems all too apparent in these harsh and stringent decisions.

The Court of Appeals does not seem unaware of the defects inherent in its "accidental means" requirement. Judge Offutt, the very author of the *Slacum dictum*, dissented vigorously in *Heil v. Linck*[26] from the result achieved by his own legal offspring. Straining to find some factor distinguishing the *Heil* case from its predecessors, he spoke of the purpose and policy of the Workmen's Compensation Law:

> "To accomplish its beneficent purpose, it was essential that it be interpreted and administered liberally to effect its intent; every consideration, social, economic, and humane, favored that policy, and it was clearly adopted as the policy of this court. The conclusion reached in this case appears to me to reverse it, and to favor in lieu thereof a narrower, technical, formalistic policy, in conflict with the plain, sound, and healthful policy of the statute."[27]

On other occasions, the Court has shown extreme liberality[28] and has utilized somewhat artificial distinctions[29]

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[24] 172 Md. 541, 193 A. 240 (1937).

[25] 156 Md. 690, 145 A. 199 (1929).

[26] *Supra*, n. 22, 647.

[27] *Supra*, n. 22, 653-4. *Ibid*, 653, 654.

[28] In both Schemmel v. Gatch & Sons Etc. Co., 164 Md. 671, 166 A. 39 (1933), and Baltimore & Ohio R. R. Co. v. Zapf, 192 Md. 403, 64 A. 2d 139 (1949), the evidence tended to show that the claimants had merely been engaged in performing their customary and routine duties when injured. But the Court, delving deep into the factual circumstances, found sufficient evidence of "accidental injury" to go to the jury.

[29] An elderly road patrolman had been employed to trim grass and clear trash along the roadway. On an unseasonably hot day, he was taken from his usual light duties to load cobblestones onto a truck. The heat of the day and the weight of the stones proved too strenuous for his weak resistance; he succumbed to heat prostration and died. The Court of Appeals held that while the conditions at the time of the injury might have been usual and ordinary for one employed to load trucks, they were unusual and extraordinary for one usually engaged in lighter duties. State Roads Commn. v. Reynolds, 164 Md. 539, 165 A. 475 (1933).

The distinction appears rather tenuous. It would seem that under a proper application of an "accidental means" rationale, the necessary "accidental quality" must lie in the nature of the occurrence causing the injury, and should not be predicated upon the type of work normally performed by the employee.

See also: Baking Co. v. Wickham, 178 Md. 381, 13 A. 2d 771 (1940), where the Court employed this same device in similar fashion.

in striving to supply an "accidental means" sufficient to permit an escape from the harsh results which invariably follow upon its "routine duties" rationale.

But nothing short of overrule can prevent the applicability of case law that has become so well established. In *Kelly-Springfield Co. v. Daniels*,[30] the Court, conceding the great weight of authority to be *contra*, denied recovery where a claimant ruptured an intervertebral disc while lifting an air bag in the routine discharge of his duties. In *Stancliff v. H. B. Davis Co.*,[31] the Court thoroughly reviewed the Maryland cases, and rejected (perhaps somewhat reluctantly) the more liberal test of "accidental result" followed by the overwhelming majority of federal and state courts. By 1956, the Court required but a few short paragraphs in *Rieger v. Wash. Sub. San. Comm.*[32] to deny recovery for a back injury where the evidence failed to show "some unusual strain or exertion or some unusual condition in the employment."[33]

The Maryland cases, then, in this small but significant area of Workmen's Compensation law, preserve the doctrine of *assumption of risk* and deny recovery on the basis of a technical and unrealistic rationale which was itself conceived in error. To deem non-accidental the sort of injury involved in these cases is to defeat the very purpose and intent of the statute.

> "Such an injury is accidental in that it is unforeseen and unexpected. If it results from the conditions under which the work is carried on, there is no reason why it should not be held compensable. In such case, it is one of the casualties of the business; and it is the purpose of the compensation statutes to place the burden of such casualties upon the business and not upon the unfortunate employee."[34]

Although it is not without precedent for courts to correct prior judicial errors (and ignore stare decisis) where

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[30] 199 Md. 156, 85 A. 2d 795 (1952). See also Caled Products Co., Inc. v. Sausser, 199 Md. 514, 86 A. 2d 904 (1952).

[31] 208 Md. 191, 117 A. 2d 577 (1955). The decision would seem better justified on the ground of insufficient causal connection between the employment and the injury.

[32] 211 Md. 214, 126 A. 2d 598 (1956).

[33] *Ibid*, 216.

[34] Baltimore & O. R. Co. v. Clark, 59 F. 2d 595, 598 (4th Cir. 1932), quoted in Furlong v. O'Hearne, 144 F. Supp. 266, 268 (D. Md. 1956), the principal case noted herein.

the demands of social policy are strong,[35] they do not usually overturn a body of decisions so well-imbedded in the current of judicial precedent. The Maryland Legislature has already acted to remedy the defects arising from the application of the "accidental means" rationale in occupational disease cases,[36] and apparently in hernia[37] and sunstroke[38] injuries. The still unremedied routine exertion cases remain for its consideration.

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[35] For example see: Mississippi Baptist Hospital v. Holmes, 214 Miss. 906, 55 So. 2d 142, 25 A. L. R. 2d 12 (1951); also, Avellone v. St. Johns Hospital, 165 Oh. St. 467, 135 N. E. 2d 410 (1956); Noel v. Menninger Foundation, 175 Kan. 751, 267 P. 2d 934 (1954); Pierce v. Yakima Valley Memorial Hospital Ass'n., 43 Wash. 2d 162, 260 P. 2d 765 (1953).

[36] Md. Code (1957), Art. 101, Secs. 22-30; see Gunter v. Sharp & Dohme, 159 Md. 438, 151 A. 134 (1930), and Cambridge Mfg. Co. v. Johnson, 160 Md. 248, 153 A. 283 (1931).

[37] 8 Md. Code (1957), Art. 101, §36(5)(a).

[38] *Ibid*, §67(6).