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volved an employee who was required to report from his job at one location to another place. In making the trip the employee deviated from his regular route by taking a side-trip to spend the night with his family. Early the next morning he resumed his trip toward the new location and when at a point only three miles from his regular route, he was killed in an automobile collision. In denying an award of compensation the court conceded that the nature of his work and terms of his contract required him to travel, but found that at the time and place of his death he was engaged in his own pleasure while returning to the usual route of travel. Thus, the court followed the majority view. However, a minority take the view that an injury occurring during the journey toward the normal route should be compensable because the employee's only purpose is getting to his employment destination.[56]

RICHARD D. COOPER

WORKMEN'S COMPENSATION — ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

In order for an injury to an employee to be compensable under the Workmen's Compensation Statute, the employee must prove among other things that the injury "arose out of and in the course of employment." As was pointed out in a previous note,[1] this latter phrase was defined by the Court of Appeals of Kentucky in the first workmen's compensation case to come before the court when it said:

> The words, "in the course of" employment have reference to the time, place and circumstances [activity], while the words "arising out of" the employment relate to the cause or source of the accident. "The term 'out of' and 'in the course of' are not synonymous, and if either of these elements is missing, there can be no recovery. The two questions are to be determined by different tests. The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place and circumstances [activity] under which it occurred."[2]

In other words, "whenever your controversy stems from the nature of a source of injury to the claimant, you have primarily a question of 'arising out of the employment'."[3] Thus, it becomes important to know whether the injury was the result of the manipulation of the tools of his work, or from the personal animosity of a fellow employee, or from something else such as a stray bullet or bolt of

[56] 1 Larson, op. cit. supra note 5, § 19.33.

[1] Note, 47 Kentucky Law Journal 420 (1959) supra.
[2] Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 280-81, 204 S.W. 2d 152, 159-60 (1918).
[3] 1 Larson, Workmen's Compensation § 23.61 (1952).

lightning.[4] If the "basic controversy stems from the nature of a course of conduct deliberately undertaken by the claimant, you have primarily a question of course of employment."[5] Here, it becomes important to know the time, place and activity the claimant was engaged in to determine whether he was in the course of employment.

This note proposes to deal with the "course of employment" factor with particular emphasis on the "activity" of the employee. The element of "place" has already been considered in the preceding article where emphasis was on the "going and coming" rule and its various "exceptions."[6]

Fulthermore, this note proposes to deal with the "arising out of" factor with respect to the nature of the source of the injury. In discussing this problem it is presumed that the employee is at the place he is required to be, at the time he is required to be there, and engaged in the activity he is employed to perform. The critical inquiry centers only around the nature of the source of the injury. Every member of society is exposed to certain dangers such as being struck by a stray bullet or a bolt of lightning, whether or not he is employed. Where a member of society is employed and is injured from one of these sources of danger to which the public is equally exposed, the question is whether the danger is a risk of the employment and thus, satisfies the requirement of "arising out of" the employment.

"IN THE COURSE OF" — ACTIVITY

(1) *Personal comfort*

The employee may be at the place he is required to be, at the time he is required to be there and yet, not engaged in the manipulation of the tools of his work. The employee may be engaged in eating, smoking, going to the rest room, getting warm or any other activity for his personal comfort. In answering the question whether an injury, incurred while an employee was engaged in an activity for his personal comfort, was one incurred in the course of his employment the Kentucky Court said:

> It is a firmly established rule that acts necessary to the comfort and convenience of the employee while at work, though strictly personal to himself and not acts of service, are incidental to the service, and injuries sustained in the performance of such acts are deemed to have arisen out of the employment.[7]

[4] Id. § 7.00.
[5] Id. § 23.61.
[6] Supra note 1.
[7] Codell Construction Co. v. Neal, 258 Ky. 603, 607, 80 S.W. 2d 530, 532 (1935). This was really an "in the course of" problem. Courts often confuse the two.

The theory for holding the employer liable for injuries which occur while the employee is engaged in an activity for his personal comfort is that such activity indirectly benefits the employer. If the employee were unable to get a drink of water during his working hours the work of the employee would definitely suffer, thus the employer is benefited when the employee engages in such activity.[8] Another and more realistic theory advanced by Larson is that the activity is a part of the employment "either because of its general nature or because of the paticular customs and practices in the individual plant."[9]

An illustration of the application of the rule is *Phil Hollenbach Co. v. Hollenbach*,[10] which involved an injury to an employee while he was in the wash room. In affirming an award of compensation the court said:

> Undoubtedly, one who is washing, dressing and preparing himself on the master's premises at the close of the day's work, to leave the premises is . . . in the course of his employment, because all these things are reasonably incident to the day's work.[11]

However, not all activities of any employee are considered incidents of the employment. For instance, where the activity in which the employee is engaged is wholly foreign to the employment the injury will not be considered in the course of his employment. Thus, in *Meem Haskins Coal Corp. v. Back*,[12] burns suffered by an employee while sleeping in the mine blacksmith shop before an open fire were not compensable. The court concluded that there was a break in employment when he went to sleep. However, it could be argued in a case like this that the fact that the employee went to sleep on the job in itself should not take the employee out of the course of employment. Instead, other factors should be considered such as the extent and duration of the sleep; the question whether the sleep was intentional or unintentional; the effect of a duty upon some employees, such as watchmen, to remain awake; and the effect of an enforced lull in the work during which employees have no active duties to keep them occupied.[13]

Examples of some of the activities which have been held incidents of the employment, and thus in the course of employment, are a night watchman injured while warming at a forge;[14] an employee injured while waiting for a detour to be cleared so he could pass;[15]

[8] 1 Larson, op. cit. supra note 3, § 20.10.
[9] 1 Larson, op. cit. supra note 3, § 20.20.
[10] 181 Ky. 262, 204 S.W. 152 (1918).
[11] Id. at 280, 204 S.W. at 159.
[12] 278 Ky. 535, 128 S.W. 2d. 913 (1939).
[13] 1 Larson, op. cit. supra note 3, § 21.70.
[14] Allen v. Columbus Mining Co., 207 Ky. 183, 268 S.W. 1073 (1925).
[15] Warfield Natural Gas Co. v. Muncy, 244 Ky. 213, 50 S.W. 2d. 543 (1932).

a coal miner drinking acid mistaken for water;[16] and a yard brakeman injured while running to obtain a rain cover to protect him from the rain.[17]

(2) *Horseplay*

Another instance where the activity of the employee is of prime importance is where the employee is injured as a result of horseplay. The general rule is that injuries sustained as a result of horseplay are not compensable.[18] To this rule two exceptions have been made: (1) where the injured employee was not a participant in the horseplay and (2) where the horseplay was known to the employer who permitted it to continue without interference.[19] An illustration of a case where the injured employee was a participant and thus barred from recovering compensation is *Hazelwood v. Standard Sanitary Mfg. Co.*[20] In that case Hazelwood and others were dusting off their clothes with an air hose preparatory to leaving the factory. Hazelwood, in dusting off a fellow employee with the air hose, playfully endeavored to blow off his hat. Later when an employee was dusting off Hazelwood's clothes, he applied the hose to Hazelwood's rectum, thus causing his intestines to balloon and rupture. The court concluded that since Hazelwood was engaged in skylarking and horseplay, the accident did not occur in the course of employment.

The rule excluding compensation where the injured employee is a participant has been softened by the second exception which extends coverage to participants in the horseplay if the horseplay is a regular incident of the employment. Thus, in *Hayes Freight Lines, Inc. v. Burns*,[21] a fellow employee placed the fuse of a firecracker against the lighted cigarette of the claimant and the resulting explosion resulted in the loss of claimant's eye. The court held that the employee was a participant in the horseplay, but remanded the case to determine if the employer had knowledge that employees customarily or habitually engaged in horseplay to such an extent that the horseplay was an incident of employment.

The rule excluding participants from the benefits of compensation has been the subject of much attack. For instance, Horovitz

[16] Harlan Collieries Co. v. Johnson, 308 Ky. 89, 212 S.W. 2d. 540 (1948).
[17] Blue Diamond Coal Co. v. Walters, 287 S.W. 2d 921 (Ky. 1956). *See* Codell Construction Co. v. Neal, 258 Ky. 603, 80 S.W. 2d. 530 (1935) (night wachman warming himself at fire); Standard Elkhorn Coal Co. v. Stidham, 242 Ky. 228, 46 S.W. 2d. 120 (1931) (employee left his work to get statement of earnings and was injured while returning on coal car); Stearns Coal and Lumber Co. v. Smith, 231 Ky. 269, 212 S.W. 2d 277 (1929) (coal miner was injured when he climbed on a motor to request the motorman to carry his dinner bucket).
[18] Hayes Freight Lines, Inc. v. Burns, 290 S.W. 2d. 836, 838 (Ky. 1956).
[19] Ibid.
[20] 208 Ky. 618, 271 S.W. 687 (1925).
[21] 290 S.W. 2d 836 (Ky. 1956).

would abolish the distinction between participants and non-participants and substitute the following rule:

> The more recent and better rule is to allow an award for an injury resulting from horseplay, even to aggressors, where the injury is a by product of associating men in close contacts, thus realistically recognizing the "strains and fatigue from human and mechanical impacts."[22]

Larsen agrees that the problem of participants in horseplay which has often been treated as an "arising out of" problem should be treated as an "in the course of" problem.[23] Thus, minor acts of horseplay would not necessarily constitute departures from the employment. Under this test the question would be the extent of the deviation; the completeness of the deviation; the extent to which the practice had become an accepted part of the employment; and the extent to which the employment from its nature may be expected to include some such horseplay.[24]

"ARISING OUT OF"

Now turning to the "arising out of" element of the phrase "arising out of and in the course of employment," the controversy relates to the nature of the source of the injury to the employee.[25] In order to point up the problem the sources of injury or the risks may be classified into three types. First, there are risks which are distinctly associated with the employment, that is, "the obvious kinds of injury one thinks of at once as 'industrial injury'."[26] An example would be the caving in of the roof of a coal mine on the employees. Secondly, risks that are personal to the claimant, that is, origins of harm so clearly prsonal that "even if they take effect while the employee is on the job, they could not possibly be attributed to the employment."[27] An illustration of a personal risk is where an employee is killed on the job by a personal enemy. In the third category are the neutral risks, that is, that type of risks of "neither distinctly employment nor distinctly personal character,"[28] and it is with these neutral risks that the courts have the problem of determining whether they arise out of the employment.

In order to determine whether a neutral risk arises out of the employment, various tests have been applied which are: (1) the in-

[22] Horovitz, "The Litigious Phrase: 'Arising out of' Employment," 3 NACCA L.J. 15, 58 (1949).
[23] 1 Larson, op. cit. supra note 3, § 23.61.
[24] 1 Larson, op. cit. supra note 3, § 23.00.
[25] 1 Larson, op. cit. supra note 3, § 23.60.
[26] 1 Larson, op. cit. supra note 3, § 7.10.
[27] 1 Larson, op. cit. supra note 3, § 7.20.
[28] 1 Larson, op. cit. supra note 3, § 7.30.

creased or peculiar risk doctrine which requires a showing that the injury was caused by a peculiar or increased risk to which the claimant, as distinct from the general public, was subjected by his employment; (2) the actual risk doctrine which requires a showing that the risk, even if common to the public, was an actual risk of the employment; (3) the positional risk doctrine under which an injury is compensable if it would not have happened but for the fact that the conditions or obligations of the employment put the claimant in the position where he was injured; and (4) the proximate cause test which requires forseeability and absence of intervening cause.[29] In discussing the court's treatment of various neutral risks reference will be made to the tests applied by the court and the possibility of the application of the preceeding tests.

(1) *Assault*

A good illustration of a neutral risk and the application of the peculiar risk doctrine is *Lexington Ry. System v. True*[30] where a motorman while opearting a street car was struck by a bullet fired from a rifle of a small boy who was shooting at a bird. Since the public was equally exposed to being struck by a stray bullet and the risk was not peculiar to motormen of street cars, the court held that the injury was not compensable under the peculiar risk doctrine, the rule applied by most courts. The court also considered the "street risk" rule which is a modification of the peculiar risk doctrine. The "street risk" rule is that "when a workman is sent into the street on the employer's business his employment necessarily involves exposure to the risks of the street and an accident sustained from such a cause is held to arise out of his employment."[31] However, the court refused to apply the "street risk" rule concluding that the risk of being struck by a bullet shot from a gun by a small boy was not a risk of the street, although the risk of being struck by the bullet of a bank robber would be a risk of the street.[32] This reasoning certainly made a narrow distinction in what is and what is not a risk of the street.

Although compensation was not allowed under the peculiar risk test, the result might well have been different under the actual risk doctrine on the ground that the danger of being struck by a stray bullet is an actual risk of driving a street car. In addition, compensation would have been awarded under the positional risk test, the

[29] 1 Larson, op. cit. supra note 3, § 6.00.
[30] 276 Ky. 446, 124 S.W. 2d. 467 (1939).
[31] Id. at 448, 124 S.W. 2d at 468; 1 Larson, Workmen's Compensation § 9.40 (1952).
[32] 276 Ky. 446, 448, 124 S.W. 2d. 467, 469 (1939).

most liberal of all tests, on the ground that the motorman would not have been shot but for the fact that he was where his employment required him to be at the time he was injured.[33]

Instead of an assault resulting from a stray bullet the assault may be contributed to by the nature of the employment. For example, where the nature of the employment requires dangerous duties such as the duties of policemen, deputy sheriffs, and night watchmen, such injuries incurred in the performance of these duties arise out of the employment.[34] However, some confusion has resulted in this type of case because of an early case, *January-Wood Company v. Schumacher*,[35] which involved a night watchman who was killed while making his rounds by a man who had been courting his wife. The court correctly held that since private malice was the exciting cause of the killing, it did not arise out of the employment. The confusion occurs in a case where the motive of the assailant is unknown or where the assault is unexplained.[36] Thus, in *Howard v. Dawkins Log and Mill Co.*,[37] a watchman was killed by an unknown assailant while the watchman was in the course of his employment. In approving a denial of compensation the court concluded that there was no justifiable inference that the assault had some cause or connection with the employment and that the burden of proof is upon the claimant to show that the injury arose out of and in the course of employment. Larson suggests that in a case of this type the court should, in the absence of any evidence of what caused the death, indulge a presumption or inference that the death arose out of the employment.[38] In effect, this is what the court did in *City of Harlan v. Ford*,[39] in which Ford and a fellow police officer in response to a trouble call drove into an ambush and Ford was killed. The employer contended that the claimant must show some motive for the assault having some casual connection with the employment. The court rejected that contention holding that the officers were discharging their duty as policemen and thus the injury arose out of the employment.

Another line of cases involves the problem of assault by claimant's fellow employee. Again the court makes a distinction in this type of case between the participant and non-participant,[40] as was made in the horseplay cases. Generally the aggressor is barred from

[33] 1 Larson, Workmen's Compensation § 10.12 (1952).
[34] Id. § 11.11(a).
[35] 231 Ky. 705, 22 S.W. 2d. 117 (1929).
[36] 1 Larson, op. cit. supra note 33, § 11.33.
[37] 284 Ky. 9, 143 S.W. 2d. 741 (1940).
[38] 1 Larson, op. cit. supra note 33, §§ 10.32, 11.33.
[39] 252 S.W. 2d. 684 (Ky. 1952)
[40] 1 Larson, op. cit. supra note 33, § 11.15(a).

recovering workmen's compensation.[41] However, a minority do not allow the aggressor-defense to the employer and instead look to see if the assault had its origin in the nature and conditions of the employment.[42]

When the subject matter of the dispute is the employment, then the injury is said to arise out of the employment. For example, in *Hansen v. Frankfort Chair Co.*,[43] the superintendent of the factory was discussing the work with an employee and the discussion erupted into a fight in which the employee was injured. The court in reversing a denial of compensation held that the subject matter of the dispute was related to the work, and thus, the injury arose out of the employment. Even where the dispute does not have its origin in the work, some courts will allow compensation on the ground that the strain of enforced close contact may in itself provide the necessary work connection.[44] Justice Rutledge well stated this view when he said:

> The environment includes associations as well as conditions and that associations include the faults and derelictions of human beings as well as their virtues and obediences. . . . In bringing men together, work brings these qualities together, causes frictions between them, creates occasions . . . for fun making and emotional flare-up.[45]

Under this view, the causal connection may be supplied by a showing of environment that increases the likelihood of assault. In other words this is very close to an application of the positional risk test.[46]

(2) *Lightning*

The cases where an employee is struck by lightning while engaged in performing his work have presented the court with difficulty in determining whether the injury arises out of the employment. The problem has resulted because on the facts it often seems clear that the public generally is equally exposed to being struck so the peculiar or increased risk doctrine does not apply. For example in *Fuqua v. Department of Highways*,[47] the claimant sought shelter from rain in a garage which was struck by lightning killing him instantly. In applying the peculiar risk test, the court affirmed a denial of compensation on the ground that there was no evidence that there was a greater likelihood of him being struck than others of the general public.

[41] Ibid.
[42] 1 Larson, op. cit. supra note 33, § 11.15(c).
[43] 249 Ky. 194, 60 S.W. 2d. 349 (1933).
[44] 1 Larson, op. cit. supra note 33, § 11.16(a).
[45] Hartford Accident and Indemnity Co. v. Cardillo, 112 F. 2d. 11, 15 (C.A.D.C. 1940).
[46] 1 Larson, op. cit. supra note 33, § 11.16(a), 11.16(c).
[47] 292 Ky. 783, 168 S.W. 2d. 39 (1943).

However, compensation will be awarded under the peculiar risk theory where there is a finding that the current of the stroke is aided or assisted in some manner to seek out and land upon the injured employee. For instance, in *Bales v. Covington*,[48] an employee was struck by lightning while unharnessing his employer's horses in a barn which had a metal roof. The court held that the injury arose out of the employment on the ground that the barn aided the lightning in seeking out the employee. Larson says that there is a slow tendency to abandon the peculiar or increased risk test in the act-of-God situation in favor of the actual risk or even positional risk doctrines.[49]

The court could conclude under the actual risk test that where an employee is required to work outdoors the danger of being struck by lightning is an actual risk of the employment. Or compensation could be awarded under the positional risk doctrine on the theory that but for the fact that he was where he was required to be, he would not have been struck by lightning.[50] The choice of the test to be used is really just a matter of how liberal the court feels in carrying out the purposes of the Workmen's Compensation Statute.

RICHARD D. COOPER

TRAUMATIC PERSONAL INJURY: A DISCUSSION OF THE 1956 AMENDMENT TO THE KENTUCKY WORKMEN'S COMPENSATION ACT

Introduction

It is elementary that a claimant must show, among other things, that he has sustained a personal injury in order to obtain an award under workmen's compensation acts.[1] More specifically, a claimant in Kentucky must show that he suffered a "traumatic personal injury" under the 1956 amendment to Kentucky Revised Statutes, sec. 342.005(1).[2] The section now reads, as to the coverage of the act, that:

> It shall affect the liability of the employers subject thereto to their employes for a *traumatic* personal injury sustained by the employe by accident . . . arising out of and in the course of his employment . . . provided, however, that "*traumatic* personal injury by accident" as herein defined shall not include diseases except where the

[48] 312 Ky. 551, 228 S.W. 2d. 446 (1950).
[49] 1 Larson, op. cit. supra note 33, § 8.12.
[50] Ibid.

[1] 1 Larson, Workmen's Compensation § 42.10 (1952).
[2] Kentucky Acts 1956, ch. 77, § 1.