The General Development of Workmen's Compensation Acts

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THE GENERAL DEVELOPMENT OF WORKMEN'S COMPENSATION ACTS.*

"By Accident Arising out of and in the course of the employment"

It is now proposed to make a study of the cases dealing with the phrase "by accident arising out of and in the course of the employment." This phrase is taken from the English Act of 1897 and was not given an application by the English courts that was calculated to secure certainty to say the least. Most of the American courts have copied it, although some of them have omitted some part. For example, the Massachusetts act does not contain the words "by accident."

Most of the cases considered in this study are rulings of the compensation board and were not carried to the Court of Appeals. All cases decided by the Court of Appeals on this phrase have been considered, but their number is so few that they are not sufficient to use for comparisons and conclusions. The Kentucky act has not been in force long enough, considering that the state is not an industrial one, to enable one to find very many cases that have been carried to the Court of Appeals upon any phase of the act. Rulings of the board, supplemented by court holdings, when available, must be sufficient for our purpose.

"By Accident"

Section 4880, Kentucky Statutes, fixes liability upon the employer in applicable cases for personal injuries sustained "by accident arising out of and in the course of the employment, or for death resulting from such accidental injury; provided, however, that personal injury by accident as herein defined shall not include disease, except where the disease is a natural and direct result of traumatic injury by accident, nor shall they include the results of a pre-existing disease."

By the word "accident" as employed in the above section is meant something unusual, unexpected, and undesigned.79 Whether the event is occasioned with or without negligence does not affect the case.

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An important question is raised by the words "injury by accident" as used in Workmen's Compensation Acts. Shall previously existing diseases affect the claimant's demand for compensation? The general rule is that the employer takes the employee subject to his physical condition and that if the employee can show that the injury was caused by an accident in the course of the employment and arising out of the employment, he can recover.

The Kentucky act has provided that personal injury by accident shall not include the results of a pre-existing disease. The board discussed that question in an early case.80 "Under previous compensation acts . . . there arose cases in which an employe, prior to his injury, had contracted certain constitutional or chronic diseases, such as syphilis, diabetes, tuberculosis, etc.; on receiving a comparatively slight injury, and one which a normal person would readily be recovered from, these diseased employes would develop a prolonged disability, which was from a practical standpoint chiefly due to their previously diseased condition.

"The accidental injury would be the immediate, precipitating cause, but the disability would not have resulted but for the pre-existing disease, it becoming customary to hold that such cases were subject to compensation for the whole disability which might result from the combined effects of the injury and the disease, injustice resulted both to the employer in having to pay excessive compensation for trivial injuries, and also to the employes in subjecting them to occupational discrimination.

"Under this state of the law it became necessary for employers to protect themselves by refusing employment to diseased persons, on account of the undue hazard of employing them. The employe who had been so unfortunate as to contract one of these diseases thereby suffered the added misfortune of being placed at a distinct disadvantage in securing further employment in competition with other labor.

"To prevent the employers from being penalized for giving work to this class of employes, and thereby afford them a more equal chance of earning a living, the above-quoted provision of the Kentucky act was adopted. It subjects the employer to a uniform liability for the actual results of personal injuries

sustained in his employment, but provides that his liability shall not include the results of a pre-existing disease.

The actual application of the provision is sometimes a problem. In cases including both the results of an accidental injury and the results of a pre-existing disease, the board must determine how much is due to each. Here they exercise exactly the same function as a jury in a trial at common law. They must present a definite conclusion from a mass of more or less indefinite evidence. In such a case personal opinion plays a large share in the decision.

A far more difficult problem is presented in the case of occupational diseases. Are they "injuries by accident" under the act? They are not. Some acts provide compensation for personal injuries and occupational diseases, but the only provision in the Kentucky act is for accidental injuries.

This has been worked out by giving a particular meaning to the word "accident." It must be traced to a definite time, place and cause.

The case of William Simon v. Louisville Ice & Cold Storage Company will illustrate. William Simon was employed by the Louisville Ice & Cold Storage Company as an ice puller. Sores and boils developed on his legs, caused by calcium brine dripping upon his trousers and shoes, and in that way coming in contact with his flesh. The disability was not the result of any particular application of the brine but due to the continued applications during the course of his employment.

The board denied compensation, holding that the framers of the act meant to limit compensation to accidents at some definite time and place, resulting from some definite cause.

This seems to have been the intention of the legislators, if one will consider the act. Section 4944 provides that the employer must keep a record of all injuries and report them to the board within one week. Section 4914 provides that no proceeding for compensation shall be maintained unless the employee shall have given notice to the employer as soon as practicable after the accident. Section 4915 provides that such notice shall state the time, place of occurrence and nature and cause of the

accident. It would seem from a study of these sections that the act contemplates an accident that is traceable to a definite time, place and cause.

Of course, it is the problem of the legislature whether occupational diseases shall be included under the provisions of the act. At first thought, it would seem that an injury which is the result of a gradual growth should be just as deserving of compensation as one that can be traced to a definite time and place. Both occurred in the course of the employment and are a direct result of the employment.

But there are good grounds for the legislature desiring to omit occupational diseases from the provisions of the Kentucky act. The act provides that the employe must give notice to the employer as “soon as practicable after the happening” of the accident. This gives the employer an opportunity to investigate the matter personally soon after its occurrence. Such immediate supervision, so necessary to prevent fraud or imposition, is not possible if occupational diseases are included. Witnesses are also much more easily obtainable if the accident can be limited to a definite date and they will better remember the accident if it can be traced to a definite time.\(^2\)

Thus, if occupational diseases are not included, the employer can find witnesses to whom the details of the accident stand out vividly. If occupational diseases are included, it becomes more and more necessary to rely upon the testimony of medical experts as to whether the injury was sustained out of and in the course of the employment.

Every disease sustained while the employe was holding down a job would be alleged to be sustained in the course of employment, and a constant guard against fraud would have to be maintained if proper protection were afforded the employer.

It would seem that the legislators were wise in omitting occupational diseases from the provisions of the act.

Section 4880 provides that personal injury by accident does not include diseases except where the disease is a natural and direct result of traumatic injury by accident. It would seem unfortunate that the word “traumatic” was used in the act.

In the case of *Pearl White v. Kentucky Collieries Corporation* the board in discussing what would be a "traumatic injury," held as follows:

"In this case the burden is upon the plaintiff to show that his disability is due to traumatic injury by accident.

"The Century Dictionary defines traumatic to be: 'An abnormal condition of the human body produced by external violence as distinguished from that produced by passions, symptomatic infections, bad habits, and other less evident causes. Traumatism, an external wound as distinguished from one caused by the surgical knife in an operation. 2. External violence producing bodily injury.'

"It will thus be seen that the instant case, where the claimant was injured by foul air and gases, does not come within the definition of trauma, when the above definitions are considered, and the Kentucky act prescribes that the disability must be due to a traumatic injury by accident."

This question as to whether the injury is a "traumatic injury" usually arises in Kentucky in a case where the injured party has breathed foul air and gases in a mine.

Following the Pearl White case, decided February 1, 1921, and quoted above, where compensation was denied, the board reached a like decision in *Jeff Kiser v. Marrowbone Mining Company*, decided Dec. 20, 1921. But in *Harris v. Render Coal Company* a different result was reached.

In that case the deceased was overcome by carbon monoxide gas on July 30, 1918, and died August 1, 1918. The board found as a finding of fact that his death was the result of accidental injury, arising out of and in the course of his employment and was not the result of a pre-existing disease. The deceased was found in a state of collapse in the mine, overcome by the gas, and showed all the symptoms of such poisoning. The board in granting compensation said: "We think an employe may as surely suffer an accident by being overcome with carbon monoxide gas as if he were struck by a piece of falling slate, and if death results therefrom, under the provisions of the act, his de-

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84 *Jeff Kiser v. Marrowbone Mining Co.*, 4 Ky. Leading Decisions 196.
85 *Harris v. Render Coal Co.*, 4 Ky. Leading Decisions 17.
pendents would be entitled to receive compensation. . . . In the instant case there is no evidence that decedent had been affected by this gas previously, or that there had been a slow and gradual process of absorption by him that culminated so fatally. We believe the section of the act cited (section 4880) under a fair and reasonable construction, giving to the words their usual and ordinary meaning, covers an accident such as befell Harris."

The board in its decision of the Harris case distinguishes that case from the Pearl White case by saying that "in the Harris case, the accidental injury is traceable to a definite time, place and cause, and the accidental injury suffered by decedent and his subsequent death were in point of time contiguous and one continuing event, while in the Pearl White case . . . . the claim was for disability caused by disease resulting from the injury received, and not for death resulting from accidental injury."

This distinction is poorly made. Of course the Harris case was one of accidental death, while the Pearl White case was one of disability not resulting in death. But both cases were traceable to a definite time and place—the board in the Pearl White case finding as a fact that "Pearl White was injured on the 12th day of July, 1919, while working in the mines of defendant, said injury being caused by the foul and impure air and gases in the mine, and from which the claimant was disabled from work."

The only real difference in the two cases is that one resulted in death and the other in disability. Does that make one of them less entitled to compensation than the other? Whether death or disability results, compensation, of course in comparative amounts, should be awarded.

Following the granting of compensation by the board in the Harris case, the case of the Jellico Coal Company v. Adkins came before the Court of Appeals and compensation was denied. The case lays down the present law on the question in Kentucky. In that case Morgan Adkins, while employed by the Jellico Coal Company, became ill from the effects of bad air in the defendant's mine, and discontinued his employment on January 26, 1920. At the time of the action he was found by

50 Jellico Coal Co. v. Adkins, 197 Ky. 972.
the board to be suffering from inflammation of the lining of
the heart. No other employe in the mine at the time that Ad-
kins became ill suffered any ill effects from the conditions exist-
ing there.

The court held that the act implies from the use of the
words "traumatic injury" that "some external physical force
actually directed against the body must occur in order to con-
stitute traumatic injury by accident." The board, the court
found, did not have jurisdiction to award compensation but
the plaintiff might have an action at law.

This decision places a narrow construction upon the word
"traumatic." The impact of a germ upon the integrity of the
claimant's body, a blow which though microscopically minute,
produces an immediate effect, may well be held to be a "trau-
matic injury."

When one is injured by foul air and gases in a mine, some
external, physical force has actually been directed against the
body. Placing this construction upon the word, sudden, unex-
pected gas and foul air accidents would be within the jurisdic-
tion of the board.

The claimant would still have to show that the injury oc-
curred at some particular time and place. This would give
compensation for the sudden injury which seems just and would
continue to eliminate the so-called occupational disease claims,
where the foul air has affected the claimant through continued
exposure to it for some length of time. .

It would seem better, though, to cut out the word alto-
gether. Then the exception in the act would read, "Except
where the disease is the result of an injury by accident." We
have shown that a strict construction of the word leads to an un-
satisfactory results. The same results that a broad construction
would give can be achieved with the word omitted.

By the construction of the courts a compensable accident
has been construed to mean one that can be traced to a definite
time, place and cause. Placing this construction on the word
"accident," sudden, unexpected foul air and gas injuries would
be compensable and those that were not in this class but were
of the so-called occupational type would not be within the
board's jurisdiction. This gives the same result as a broad con-
struction of the word "traumatic." Thus the act would be more satisfactory with the word omitted.

"Arising out of and in the course of the employment"

There are three requirements concerning the injury which must be met by the Kentucky claimant for compensation:

1. The injury must be sustained by accident.
2. The accident must arise out of the employment.
3. The accident must occur in the course of the employment.

Just as the court has placed a particular construction upon the word "accident" as shown in our previous section, it has raised a distinction between the terms "out of" and "in the course of."

The words "arising out of" the employment as used in the act, refer to the origin and cause of the accident, and the words "in the course of" the employment, to the time, place and circumstances under which it occurred.\(^7\)

The words "out of" have been said to be descriptive of the character or quality of the accident, the words "in the course of" referring to the circumstances under which an accident of that character or quality takes place.\(^8\)

The words "out of" have given the board and courts great difficulty; they are more difficult to apply to the various cases than any other phrase. This is especially apparent in the so-called "assault cases."

The Kentucky Court of Appeals has held that the victim of an assault is injured by accident as far as the injured party is concerned. In Massachusetts the injury need not be sustained by accident but it must be sustained in the course of the employment and arise out of it. Since the other requirements are the same in Massachusetts and Kentucky, the Kentucky board has often referred to Massachusetts cases in assault decisions.

The Massachusetts decision most frequently referred to is In Re McNicol.\(^9\) This case has been cited far and wide and may be considered the leading case on assault. In that case an employer permitted an employee to continue his work, although

\(^7\) Hollenbach v. Hollenbach, 64 supra.
\(^8\) Honold on Workmen's Compensation, vol. 1, sec. 101.
\(^9\) In Re McNicol, 215 Mass. 497.
the quarrelsome temperament and habitual drunkenness of the employe were known to the employer. He finally attacked and killed a fellow employe.

The court held that the injuries of the employe arose "out of and in the course of the employment," saying: "It is sufficient to say that an injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment."

The idea of the court seems to be that if there is danger and the employer takes no action to abate it, he thereby makes this additional hazard a part of the apparent dangers of the work to which other employes are subjected.

Injuries resulting therefrom may therefore be considered as arising out of the employment. The court limited the rule by saying, "The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious attack by a sober workman, or even rough sport or horseplay by companions who might have been expected to be at work."

It is possible to criticize the rule laid down in McNicol's case and many have done so. What would be the test of a "rational mind?" Any two individuals might decide differently. With the changing personnel of compensation boards it would be very difficult with such a loose criterion to anticipate a holding in assault cases.

The writer is even more troubled in applying the words "natural incident" to cases. Just when may an injury be considered to have followed as a "natural incident?" With such a standard it is impossible to have certainty in compensation decisions.

But the rule in the McNicol case may be commended as opening up an illuminating approach to the question in at least
one respect. The rule states that there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury. If the injury is the proximate consequence of the employment, compensation should be granted unless intervening circumstances divert the employer's liability.

The contemplation of a "reasonable man" is made the standard for distinguishing whether the accident should have been foreseen. The "reasonable man" standard has been satisfactory in other applications. Of course, when applied to juries, one discovers that their findings are inclined to vary somewhat with changing panels, but as applied to workmen's compensation boards a fairly constant result may be achieved. These boards are composed of men who may be termed experts, men skilled in this type of work, who have become more and more proficient by deciding numerous similar cases. Changes in the personnel of the board need make little difference, because their successors, with little exception, should be near the norm.

The injury may be said to arise "out of" the employment when a reasonable person familiar with the whole situation might have contemplated the accident as a possible incident of the work and the injury is the proximate consequence of the employment.

Rules, although not wholly reliable, may be an aid to boards in arriving at their findings. On the other hand, boards should be rather skeptical of rules and formulas. Indeed, the writer is inclined to agree with the Kentucky board in its holding that "In determination of whether an accidental injury 'arose out of and in the course of' the employment, each case must depend upon its own circumstances and cannot be solved with reference to any formula or principle."\(^9\)

The board is competent in the light of the individual training and experience of its members to settle each case upon its merits. The less rules they have to hamper them, the more easily will they be able to meet the purposes of the act. Taking that as a general proposition, though certain rules and formulas should be used when applicable, for in no other way can there be uniformity and certainty in holdings by the board.

The board applied the rule in McNicol's case to *Lindsay v. Federal Coal Company.* There the deceased was struck by a fellow employe while upon the employer's premises waiting for the hour of commencing work, the blow resulting in his death. The two men had had words on the day previous to the accident relative to the respective amount of coal that each was mining, and the assailant complained that the deceased had been furnished more than his share of mine cars. There was evidence that the deceased had threatened the assailant. No other motive was apparent for the attack and prior to the fatal blow no words were spoken, the assailant suddenly and without warning striking the deceased from behind. The employer had no notice of the previous ill feeling.

The court in denying compensation comes dangerously close to applying the fellow servant doctrine, which is expressly abrogated by the act. Much stress is laid on the fact that the employer knew nothing of the previous day's encounter so should not be held liable for an assault of which he might have had no premonition and which was not made to serve his interests.

But it should be no longer possible for the employer to escape liability by showing that he is free from negligence and by forcing the injured employe to accept the fellow servant doctrine.

The board cited the rule and exceptions given in McNicol's case with approval and held that the death was due to personal differences between the two men, and did not result from any danger incidental to or induced by the employment.

It is admitted that this case points out a weakness in the rule in McNicol's case. Too much stress is laid upon the employer's knowledge of the assailant's previous acts. That is well in some cases, but the employer is not to be excused by showing that he was not negligent. The thing to look at in this type of cases is not so much whether the employer was negligent, but whether the employe received an injury arising out of the employment.

The other encounter between the two men had been on the previous day. That affair was over. The attack on the day of

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the accident was a separate affair and not a part of the trouble of the previous day. Of course it is for the board to determine whether the accident is the result of a personal encounter between the two men. In such cases the courts are uniform in holding that the accident does not arise out of the employment. But where there were a few words the previous day and the next day the deceased is struck down from behind, it would seem to be apparent that it is difficult to connect the two occasions.

Rather it would seem that the jealousy of the assailant continued to grow because the deceased mined more coal than he did. The very motive for the attack grew out of the employment. It is a question of fact whether private ill feeling between the men led to the attack or whether it was a one-sided encounter. If a one-sided encounter, it would seem that there is good ground for holding the employer liable. The assault of the jealous co-employe had its origin in the occupation in which the parties were engaged.

Although the act has abrogated the fellow servant doctrine and the necessity of the employe proving the negligence of the employer, the boards and courts have so construed the phrase "arising out of the employment" that the employer is unduly protected.

_Tosh v. Norton Iron Works_ will illustrate. The employe was accidently shot by a drunken fellow employe, not on duty, who had come upon the employer's property during the night. The employe was asleep on the premises, during rest period, for which he was paid wages. The assailant had never shown any indications of bad behavior, nor was he shown to have a reputation for violence and disorder by his past conduct.

The board denied compensation. The board found that "the great weight of authority is that, under acts requiring the injury to have been sustained in the course of the employment and also to have arisen out of it, there must, in assault cases, be shown a causal connection between the resulting injury and some pre-existing incident or condition of the employment of such proximity that the rational mind, upon consideration of all the circumstances in advance of the incident, might reasonably anticipate its occurrence." This is a restatement of

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the rule in McNicol's case. The rule is broad enough to hold the employer liable in this case if given a liberal construction.

This injury had its origin in the employment. The employer might reasonably have anticipated that some drunken person would enter his premises and, eluding the guard, commit such an act. Here the board again puts the decision upon the fact that the employer had not been negligent and that he could not reasonably have anticipated the attack from any pre-existing incident or condition of the employment. This narrow interpretation by the courts generally of the phrase "arising out of the employment" shows the continued tendency to protect the employer at the expense of the employe, although the spirit of the act is clearly against it and the act need not be interpreted to do so. It seems to be a sort of hold-over from the protection of the employer which was accorded by the common law.

The board may well ask two questions in assault cases:

(1) Was the assault upon the injured or deceased employe induced by the discharge of his duties as an employe of the defendant?

(2) Or was the attack the result of personal or private differences between the employe and his assailant?

These are easier to apply to the facts of a particular case than is the rule in McNicol's case. Thus, where an employe was shot at the noon hour, while at his own home by his fellow employe and it was impossible, although there was some evidence to the contrary, to show a causal connection between the shooting and the employment, compensation was not allowed. The case comes under the second question—the assault was the result of personal differences between the two men.

In Walther v. Wood Mosaic Company the deceased had pursued a course of hostility toward his fellow employe, abusing him because he was an ex-soldier. At the time of the assault the deceased cursed the assailant about putting or placing lumber on a wagon, which they were loading in the course of their employment. The board found that this was not done to further the business of the employer and denied compensation on the ground that it was the result of personal differences between the two men. The holding seems to be correct, but the

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language of the board is highly colored by war-time feeling. This sentence is in the memoranda of the board, “It is likely that Forgy’s killing of Walther prevented someone else from killing him later, if he had persisted in his disloyal utterances.” Such a sentence has little place in the opinion of a body as dignified and dispassionate as a compensation board should be. There are better remedies for disloyal citizens than permitting private individuals to strike them down.

It is found that the Kentucky board is in accord with the majority in its decisions in assault cases. In cases, though, where the co-employee had not previously shown a disposition to be ill-behaved, it would seem, as has been said, that the boards and courts have thrown around the employer too much protection and re-erected the barrier of the fellow servant doctrine against the employee. A very narrow construction of the phrase “arising out of the employment” is apparent also in cases of attacks by a drunken trespasser or a stranger.

While applying the phrase closely in assault cases, the board is more liberal in the case of horseplay. Where the injured employee took no part in the fun-making, it is generally held that the accident arose out of the employment.

In Phillips v. Louisville Cooperage Company95 the employee lost the sight of his right eye as the result of being hit by a stave thrown by a fellow employee, who was indulging in horseplay. The claimant was not engaged in or responsible for the sportive act which caused his injury.

The board granted compensation, quoting from Hulley v. Moosbrugger: “It appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of mature age, to indulge in a moment’s diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to any one who employs labor.

“At any rate, it cannot be said that the attack upon decedent was so disconnected from decedent’s employment as to take it out of the class of risks reasonably incident to the employment of labor. At common law the master was not liable for an injury to his servant caused by the negligent act of a fellow ser-

vant, upon the ground that the servant assumed the risk. Under the Workmen’s Compensation Act, the master assumes all risks reasonably incident to the employment."^86

This is the proper result. But why should not the same rule apply in the case of assault by a drunken co-employe? There the court makes the decision rest upon notice to the employer of previous irregularities in the conduct of the attacking employe.

It is submitted that the act should be given the same literal construction in assault cases that is apparent in horesplay cases.

Where the employe is injured through some sportive act of his own, the rule is that the accident does not “arise out of the employment,” although it may arise “in the course of” it.0^7

Where the employe incurs added risks which carries him beyond the scope of his employment, the employer is not generally liable. If the employer has divided his work into certain spheres and one employe steps out of his class and attempts to do work for which he is not fitted and for which he was not hired, he should be unable to recover compensation for any injuries that he may receive.0^8 The employer has the right to manage his business as he chooses and should be able to limit his liability to the employe to the orbit in which he has placed him.

The rule is subject to certain exceptions. The employe may recover compensation for injuries received outside the immediate scope of his employment if he has varied its orbit because of an emergency. He is also allowed some latitude for the exercise of his own judgment as to when and how he can best serve the interests of his employer. As Mr. Bohlen says, “Compensation is for good servants who remain where they are put, or who only stray therefrom when they can more effectively serve their master by so doing.”

In Kraher v. Alfred Struck Company,^90 while the operator of a sanding machine was temporarily absent from the front of the machine, the claimant who was working at the rear end of the machine went to the front to shut off the roller and his hand was crushed. The claimant had been verbally warned to stay away from the front of the machine but boys frequently played with it. The sandpaper was so badly worn that the

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^86 Hulley v. Moosbrugger, 87 N. J. L. 103.
^8 See 82, supra.
machine needed to be stopped to prevent the paper from tearing.

The fact that the employe violated the instructions of his employer in going to the front of the machine and attempting to stop it did not prevent him from receiving compensation, although it was cut down 15% for violation of the instructions of his employer, as provided by the act.

The board carefully distinguishes between wilful misconduct and negligence. "What is wilful misconduct is necessarily a mixed question of law and facts. Like 'reasonable care,' 'gross negligence,' and similar terms, it is not susceptible of being abstractly defined in terms which would with uniform certainty fix a line of demarcation between what would be wilful misconduct and what would not, in advance of the particular act upon which it is to be predicated. It will always be necessary, in passing upon each case, to take into account the peculiar facts and circumstances of that case as it may arise, along with such fixed rules of construction as it may be practicable to establish in advance. It may be said, however, that 'wilful misconduct' is to be clearly distinguished from the 'contributory negligence' which is a defense at common law. It is not enough that the employe may have been negligent, even to the extent that the injury is caused solely by his own negligence. Wilful misconduct implies positive wrongdoing, rather than negligence."

Here the employe was within the area of his duty when injured. He was injured on the machine at which he worked. Although ordered to keep away from the front of the machine, he had seen other boys playing there. When the paper became loose, he did the natural thing—tried to stop the machine. There can be no doubt that he violated his instructions or that the act was negligent, but he was within the ambit of his employment and was serving his employer as he thought best. That distinguishes the case from one of wilful misconduct.

In *Graves v. Henderson Telephone & Telegraph Company*101 dynamite caps were left in a building by members of a construction crew. The plaintiff, who was in charge of the

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100 Gates v. Cottonseed Products Co., 1 Ky. Leading Decisions 147.
building, discovered them in the basement. While examining one to discover what it was, he was injured by its exploding in his hand.

The board granted compensation, holding that the plaintiff was in the course of his duty at the time of the accident and was endeavoring to serve his master's interests.

"An employe must be reasonably allowed some latitude for the exercise of his own judgment as to when and how he can best serve the interests of his employer. When these requisite conditions exist and the injury results from a special risk incident to the employment, and there is a causal connection between the conditions under which the work is required to be performed, the injury arises out of the employment even when the connection is somewhat remote, and when the direct and immediate agency is foreign."

Two cases of incurring added risk are distinguished by the board. In one the employe is sent upon an errand or is engaged in a task which takes him to the street and he rides upon a conveyance belonging to his employer in order to make better time, although he has no instructions to do so. In the other case he rides upon a conveyance belonging to a stranger.

*Justice v. Tierney Mining Company*\(^{102}\) will illustrate the first class. The plaintiff was in the employment of the defendant as a helper on a coal-cutting machine and was sent by the person in charge of the machine from the mine to telephone the electrician to come and repair the machine they were using.

He rode on a mine motor. While en route and before he reached the power house, he let his right hand drop to his side and it was caught in the revolving cogs of the motor and mangled. It was against the published rules of the company for any employe except the motorman and brakeman to ride on the motor. Compensation was granted.

*Pilcher v. Progress Chair Company*\(^{103}\) will illustrate the second class. There the plaintiff's duties required him to take bills of lading to a point one block distant. He requested permission to ride upon a truck belonging to a stranger, who had no connection with his employer's business. On attempting to


\(^{103}\) *Pilcher v. Progress Chair Co.*, 4 Ky. Leading Decisions 180.
alight from the truck at his destination, he was run over by it and injured. Compensation was denied.

In each of these cases the employe was beyond the scope of his employment. The only real distinguishing feature is that in the case where compensation was granted, the plaintiff was filching a ride upon a conveyance belonging to his employer, while in the case where compensation was denied, the conveyance belonged to a stranger.

But why should this distinction be made? Is there any real difference in the two cases? If one has an express sphere of duty and in violation of published rules chooses to go outside the scope of his employment in order to accelerate the accomplishment of that duty, he is not entitled to compensation. The right to ride upon the motor is as poorly founded as the right of the other employe to ride upon the truck. The workman may forfeit his right to compensation by choosing an unnecessarily dangerous method of doing the work. Thus, if he selects an improper method of work for some private purpose of his own, he absolves his employer from liability in case of injury.

In McDaniel v. Ashland Iron & Mining Company the deceased was working for the defendant with the dolomite gang.104 His duty was to aid in lowering barrels of dolomite from an upper floor to the ground below. After bringing a barrel of dolomite from the upper floor, he took hold of the rope used for lowering the barrels to ascend to the upper floor again, instead of using the stairway.

The stairway had been provided by the defendant for the use of the employes and was near the pit where the accident occurred. The deceased had ascended by the rope just previous to his death, although he had been warned not to do so, and the operator of the crane had rules posted in the crane cabin which prohibited employes from riding on the crane.

The board after some uncertainty granted compensation, subject to the 15% penalty for violation of rules, making an attempt to give the act a liberal construction to effectuate the beneficent purposes for which it was passed.

The board in the course of its memoranda said, "A distinction must be made between the doing of a thing recklessly

or negligently . . . and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or careless manner in which an employee does the work he is employed to do may well be held to be a risk incidental to the employment.’’ The board decided that the act of the employee was one of negligence and did not amount to wilful misconduct.

As stated, the board was hesitant in granting compensation. One is disposed to be as hesitant in accepting the ruling. If the workman has made an error of judgment or honestly believes that he is doing that which will further his employer’s interests, he is entitled to compensation. But here the employee was merely seeking to save himself exertion. He was serving a purpose of his own, outside the course of his employment. His employer had gone so far as to expressly forbid him to do the act which resulted in the injury. He exposed himself to new risks which were outside the reasonable contemplation of the parties when they made the contract of employment. They were not incident to his employment and were not entered into in an effort to further his master’s interests.

This was more than negligence. It was a headstrong exercise of the employee’s own will against the express orders of his employer—an intentional effort to serve his own inclinations. A danger which was not connected with the employment was voluntarily, even stubbornly, sought by him. He is in no position to demand a liberal construction of the ‘‘wilful misconduct’’ clause.

A difficult question arises when an employee volunteers to go beyond the scope of his own immediate employment to help another employee.

In Foreman v. Lexington Utilities Company105 the deceased was a ‘‘trouble man’’ for the utilities company and his duties were to repair electric lights in residences. He was ordered to remedy certain light trouble peculiarly incident to and connected with his general duties. By mutual agreement he and another employee rode together in an automobile belonging to the company to the scene of certain arc light trouble, which the other employee had been ordered to fix. They evidently planned to aid each other in accomplishing their separate duties.

There was a custom known to and sanctioned by the employer for employes to assist each other in cases of emergency and the deceased had assisted in the repair of arc lights at various times and places, although the policy of the company was to circumscribe the duties of its employes in the various departments. While fixing the arc light, the deceased was struck by an automobile and so seriously injured that he died.

The company contended that he was a "volunteer and acting outside his employment and duties," but the board granted compensation. He had momentarily stepped from the performance of his duties in pursuance of a custom known to and sanctioned by his employer in an honest attempt to further the employer's business.

This rule should be applied in few cases. It should be the privilege of the employer to limit the ambit of his employes' activities. Here, though, it was found that the two employes could be of mutual assistance by combining their duties, and it seems a helpful intervention upon the part of the deceased in the conduct of his master's business.

The decision should be placed squarely upon an honest attempt to further the master's business to distinguish the case from one where the employe would have become a volunteer in order to gain the companionship of the other employe in the performance of their duties or to gain a ride in the company's automobile in order to save himself the exertion of walking.

As a general rule the employe who is injured in going to or returning from work is unable to get compensation. His risks are of the commonalty for they are not incident to his particular employment.

In *Nieman v. Feldman Milk & Cream Company*\(^{106}\) an employe was walking from his home to report for work and slipped upon the icy sidewalk. The board held that he was not yet in the course of his employment and denied compensation.

The risk of commonalty doctrine received a very narrow interpretation in *Danner v. Andrott & Son*,\(^{107}\) In that case the claimant was engaged in cranking a Vim truck next to the sidewalk at the automobile entrance to the place of business of the

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defendant where he was employed as an automobile mechanic. While cranking the machine, he was shot in the leg by a member of the police department who had aimed at a colored man who was running away from a crap game. The board did not give compensation, laying down the same rule as that applied in assault cases. This rule has been criticised elsewhere in this paper. The board found that the accident did not result from any danger incidental to or induced by the employe's discharge of his duties. It was a random shot which any one on the street might have received.

Although this was not an accident "naturally" incident to the employment, it was one which might reasonably have been contemplated by the parties. Any one whose duties force him to be upon the street is exposed to innumerable accidents. The fact that he needs only to go out into the street in front of a garage lessens his chances of meeting one of these accidents but does not change the fact that the accident, if it occurs, arises out of his employment.

It is not sufficient for the employer to say that he was subject to no greater risk than the other persons on the street at the time. Honnold on Workmen's Compensation, vol. 1, page 424, says: "A clerk cutting his finger while sharpening his pencil in the course of his employment is entitled to compensation if the injury proves serious, notwithstanding the fact that his danger is no greater than that of any person carrying a pocketknife, whether employed or not." The doctrine of risk of commonalty must, therefore, be confined to cases where the risk is not naturally incident to the employment.

A more satisfactory holding was given by the board in Brown v. Adams Company, decided a year later. There the decedent at the time of his death was engaged in collecting for the defendant, was walking, and was struck by an automobile while attempting to cross the street. Accounts which he had in his possession for collection were found scattered in the street. The duties of the decedent required that he visit various parts of Louisville, to collect accounts due his employer, including the vicinity where he was killed.

Compensation was granted. The servant was in the course

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of his master’s business when the accident occurred. The fact that others were exposed to a like danger had nothing to do with whether it arose out of his employment.

This type of case should be distinguished from the case where a workman is injured by a street accident while going to or coming from work. The very nature of his employment had subjected him to this additional risk. The employer’s liability was not relieved because others in the vicinity were subjected to a like danger. His duties on the street kept him more exposed to these hazards than the ordinary member of the public. "Where the particular risk is involved in the particular thing which the workman is required to do, an accident caused by such particular risk arises out of the employment."

There is a class of cases decided by the board which may be termed "leisure time" cases. The fact that an employe is injured during a lull in his employment does not defeat his right to compensation. The phrase "in the course of the employment" is not limited to the time during which the servant is engaged in doing the work for which he is engaged. He must necessarily have periods during which he may rest or attend to calls of nature.

It is not necessary that he be paid for the time during which the accident occurs. The fact that he is drawing wages by the hour or that they are suspended during the noon hour, or even in some cases while he sleeps will not affect his recovery, if the accident is "in the course of his employment."

An employe who accidentally overturns a pot of tea and scalds herself in a lunch room provided by the employer comes within the rule that "leisure time" accidents are compensable. "Quenching thirst, relieving hunger, answering calls of nature, the performances of which, while at work, being reasonably necessary to health and comfort, are incidents of ordinary employments, and if one be injured, while thus engaged, the accident arises 'out of and in the course of the employment.' "100

There are limitations to the rule and exceptions arise, but if the employe is upon the master’s premises and at a place where he is permitted to be and is not doing an unlawful or forbidden act, the accident comes within the provisions of the act.

If the employee leaves his employer's premises for lunch, he is within the exceptions to the rule. The "place" where the accident occurs is an important factor in determining whether he can demand compensation.

The liability of the employer continues while the employee is washing up and changing clothes preparatory to going home. In **Barres v. Watterson Hotel Company** a maid employed in a hotel had finished her duties, changed her clothes, put on street attire, and entered an elevator operated by the hotel for carrying its employees, etc., in order to get to the street to go home. She was injured. The Court of Appeals held that her employment was not in abeyance and that she could not recover in a suit at law against the hotel company for its negligence, for such injury comes within the terms of the Workmen's Compensation Act.110

In **Penicks v. Hull Company**111 an employee of the defendant was seeking to locate a car load of coal in a railroad yard and stepped behind two cars in a cut of four standing detached on a siding, for the purpose of attending to a call of nature. While the decedent was between the cars, an engine kicked two other cars upon the track where the cars were standing and decedent was fatally injured. The board held that he was entitled to compensation but denied it upon another point. He was engaged in his master's business at the time of the accident and at a place where he was ordered to go. Although he had stopped to answer a call of nature he was not engaged in an unlawful act.

This case shows a clear distinction between wilful misconduct and negligence. The defendant had contended that the decedent by "the use of his eyes or by the slightest inquiry" could have discovered toilet facilities. He was very likely negligent in selecting a place but negligence alone will not deprive him of the benefits of the act. If toilet facilities had been in plain view and he had wilfully and stubbornly chosen to go between the cars, he should have been denied compensation. That would have created a situation comparable to the case of **McDaniel v. Ashland Iron & Mining Company**, which has been criticised in this paper. That was a case of a stubborn exercise of an em-

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ploye’s will to serve his own interests. This is a case of an employe, pressed by an urgent call of nature, negligently selecting a dangerous place, when at the time it appeared to him to be safe.

An oil pumper slept in a room upon the premises of his employer so that he would be available for work at all hours, his duties as a pumper being continuous during the entire twenty-four hours of the day. While he was sleeping, he was fatally injured by a gas explosion in the room he occupied. The board granted compensation, holding that he was on duty at all times and consequently the relation of master and servant existed between him and his employer at the time the injury occurred.112 His employment required him to occupy sleeping and living quarters furnished by the employer, so that he could be subject to duty at all times. A different result would arise if the employe were living on the master’s premises for his own convenience.

Where an employe leaves his place of employment during working hours for the purpose of smoking and is injured, the accident does not arise out of the employment.113 Although the act of ministration needs to be only indirectly conducive to the purpose of the employment, it must be in some way necessary to the better performance of it and not as a mere gratification of the employe’s personal desires.

CONCLUSION

Cases applying the phrase “by accident arising out of and in the course of” the employment have been examined in detail. They have shown the tendency of the board and courts to give to each of the essential words a well defined meaning. This has resulted in some types of cases in a uniformity and certainty of decision that is very satisfactory. In other cases a technical significance has been given to certain words that has thwarted the purpose of the act and given to the employer a protection almost equal to that given to him by the common law.

The phrase has been much criticised and there was some doubt whether it should be incorporated in the American acts.

The writer, after a study of the cases, is not so much inclined to criticize the phrase itself as he is the application of it.

It is doubtful if any alternative phraseology would be more pleasing in result. The literary construction of the phrase is simple and no elements are introduced by it that are not essential to a recovery of compensation.

It has been suggested that the words "by accident" have led to such an unsatisfactory result in the cases of occupational diseases that they should be omitted, as they are in the Massachusetts act. It was, of course, a problem whether to include occupational diseases under the act. The writer is inclined to agree with the evident intention of the legislature to refuse to grant compensation in such cases because of the difficulty of proof and the consequent danger of fraud and imposition.

The introduction of the word "traumatic" into the act has not had a happy result. It is possible to give a broad construction to the word and thus achieve the desired result, but the board and courts have refused to do so. The act should be amended and the word taken out.

The words "out of" emphasize the element of causal connection with the employment. This is a requisite element in every case and the board and courts have reached pleasing results generally in the application of it, except in assault cases, where an attempt has been made to preserve the defenses of the fellow servant rule and the necessity of proof of the master's negligence to the employee. This is not the result of any inherent meaning in the words themselves but merely indicates the slowness of the courts to realize that the common law defenses are abrogated by the act.

The purpose of the act would not be achieved by substituting a body of complete and precise rules for the phrase. No body of rules could cover the facts of every case and such a formulation would only tend to hinder the board in its administration of the act.

The solution is not so much in the matter of mere draftsmanship of a phrase. It is rather in the vision with which it is interpreted by the board and courts.

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