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Workmen's Compensation - Accidents Arising Out of and in the Course of Employment

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From the standpoint of legal analysis, the theory of recovery as presented in the instant decision is preferable since it avoids the use of fiction. However, it is believed that the instant theory should not be applied as broadly as stated — that a cause of action for prenatal injuries should arise only in those instances where the infant survives birth and the injurious condition arises subsequent to conception.[21] It appears that the instant theory thus modified is as applicable in Louisiana as in other jurisdictions.

Gerald LeVan

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

Plaintiff, the widow of a former captain on the city police force, brought suit against the City of Baton Rouge under the Louisiana Workmen's Compensation Statute for the death of her husband. In a physical examination the captain had been found to be physically unfit for all duty except desk work. Within a few months, the Chief of Police forwarded to him a letter which in effect demanded his retirement. The trial court found from the undisputed testimony of the deceased's physician that the resulting emotional upset was a cause in fact of the ensuing heart attack,[1] and recovery was allowed. On appeal to the Louisiana court of appeal, *held,* reversed. Death caused from agitation over retirement and occurring while on vacation neither arises out of nor occurs in the course of the employer's trade, business, or occupation. *Seals v. Baton Rouge,* 94 So.2d 478 (La. App. 1957).

Section 1031 of the Louisiana Workmen's Compensation Act provides that "if an employee . . . receives personal injury by accident *arising out of* and *in the course of* his employment, his

ceived." LA. CIVIL CODE art. 28 (1870). Youman v. McConnell, 7 La. App. 317 (1927).

21. It is felt that should the infant *survive birth* and *afterwards* die from prenatal injuries an action for wrongful death would be appropriate. See Heins v. Guzman, Orleans No. 9484 (La. App. 1924) (unreported); Janinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

1. The trial court noted that the cause in fact could have been of extreme significance. In heart attack cases, the crucial issue is often cause in fact, even where the accident is of a physical nature. In this particular case, however, this issue was not contested by the defendant. In this connection, see Neldare v. Schuylkill Products Co., 107 So.2d 487 (La. App. 1958), noted in 19 LOUISIANA LAW REVIEW 916 (1959); Kraemer v. Jahncke Services, 83 So.2d 916 (La. App. 1955).

employer shall pay compensation."[2] (Emphasis added.) The general rule in Louisiana and in other jurisdictions is that the inquiry as to "in the course of employment" is concerned with the time, place, and circumstances of the accident.[3] On the other hand, the requirement that the injury must "arise out of the employment" leads to an examination of the origin of the risk which causes the injury.[4] Although theoretically the two requirements should lead to different inquiries, they are, nevertheless, interrelated, and the courts will often consider them together. For example, where there is a particularly strong showing that the injury occurred during the course of employment, i.e., that the employee was actively at work at the time of the accident, the court will award compensation without being too concerned with the origin of the risk.[5] This was the position taken by the Louisiana Supreme Court in the leading case of *Kern v. Southport Mill.*[6] As stated therein, it is sufficient to justify an

2. LA. R.S. 23:1031 (1950).

3. Fields v. Brown Paper Mill Co., 28 So.2d 755 (La. App. 1956). See also MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 162 (1951) and LARSON, WORKMEN'S COMPENSATION LAW § 6.10 (1952).

4. Myers v. Louisiana Ry. & Nav. Co., 140 La. 937, 74 So. 256 (1917). See also MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 162 (1951) and LARSON, WORKMEN'S COMPENSATION LAW § 6.10 (1952).

5. Humphreys v. Marquette Casualty Co., 235 La. 355, 103 So.2d 895 (1958) (where employee suffers an injury while following the orders of his employer, the employer is estopped from asserting the defense that the injury did not arise out of the employment); Dobson v. Standard Accident Ins. Co., 228 La. 837, 84 So.2d 210 (1955). In Edwards v. Louisiana Forestry Commission, 221 La. 818, 60 So.2d 449 (1952), a towerman was injured while climbing down to rescue a child who was being attacked by a large dog. In granting an award, the court relied strongly on the United States Supreme Court case of O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), which presented a similar factual situation. The court held that the injury did arise out of the employment. In Harvey v. Caddo DeSoto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942), an employee was killed during a cyclone while at work in the defendant's hull house. The court found that the injury did arise out of the employment, and compensation was awarded. In Livingston v. Henry & Hall, 59 So.2d 892 (La. App. 1952), an employee was shot and killed while doing construction work. The assailant was not connected with the employment, and only by chance did he find the deceased while he was at work. Nevertheless, the court found that the injury did arise out of the employment, and compensation was awarded. In Green v. Heard Motor Co., 53 So.2d 700 (La. App. 1951), a car salesman, while waiting for a prospective customer, accepted the invitation of a third party to go for a ride in his airplane. The plane crashed and the salesman was killed. The injury did arise out of the employment. In Favre v. Werk Press Mfg. Co., 152 So. 694 (La. App. 1934) the plaintiff was hit in the eye with an alligator pear seed as the result of horseplay by two other employees and the court held the accident arose out of the employment. The plaintiff recovered. *But see* Leckie v. H. D. Foot Lumber Co., 40 So.2d 249 (La. App. 1948), in which an employee, while at work in a sawmill, injured his thumb while sawing a piece of wood for his own use. With Judge Kennon dissenting, the court held that the injury did not arise out of the employment.

6. 174 La. 432, 141 So. 19 (1932). Compensation was awarded to a pipefitter who was hit by an automobile when he stepped from a streetcar into the street. He was returning from an outside job. The court said: "In determining whether an accident 'arose out of the employment,' it is necessary to consider only this:

award if the employee was at the scene of the accident because of his employer's business, and not due to his own personal desires. Such a standard involves only the time, place, and circumstances of the accident, and obviates the necessity of any inquiry as to the origin of the risk. Where the employee is not actively at work at the time of the accident, his showing that the injury occurred during the course of employment will, of course, be weaker. In these situations, the court will usually deny a recovery in the absence of a relatively strong indication that the origin of the risk which caused the injury was connected with the employment.[7] An examination of the jurisprudence reveals that the courts have used the terms interchangeably at times, and awards have been denied on the ground that the injury did not arise out of the employment where the main problem would appear to be whether the injury occurred during the course of employment.[8] For this reason it is difficult to formulate rules based on the language of the courts.[9]

The facts of the instant case present a situation in which the plaintiff's case appears to have been rather weak with respect to both requirements. However, because the letter was an official

(1) Was the employee then engaged about his employer's business and not merely pursuing his own business or pleasure; and (2) did the necessities of the employer's business reasonably require that the employee be at the place of the accident at the time the accident occurred?" *Id.* at 438, 141 So. at 21.

7. In Warren v. Globe Indemnity Co., 217 La. 142, 46 So.2d 66 (1950), a traveling salesman went to Olla, Louisiana, on a business trip. After waiting in vain to see his business contact, he drove to Winnfield, Louisiana, picked up his girl friend, and went out for dinner. After eating they visited a friend of the girl, and while returning to her house the salesman was killed in an automobile accident. The evidence was not conclusive as to whether he was going back to Olla that night to see the business contact. The court denied compensation on the ground that the accident did not arise out of the employment. In Laine v. Junca, 207 La. 280, 21 So.2d 150 (1945), the employee departed from his normal duties on the ranch to help another employee herd mules into a catchpen. While so doing, he was hit in the eye with the end of a whip. The court denied compensation on the ground that the injury did not arise out of the employment. It is significant, however, that the court took notice of the fact that this employment did not appear to be of a hazardous nature, as required by the statute. In Jinks v. Burton Sutton Oil Co., 44 So.2d 343 (La. App. 1950), the employee was killed during working hours, but while on the way to his home. With the employer's permission, he had left work early and had dropped off some maps prior to the accident. The court held that the accident did not arise out of the employment. In Como v. Union Sulphur Co., 182 So. 155 (La. App. 1938), the plaintiff departed from his employment of supervising construction work on the Calcasieu River, and went dynamiting for fish with other employees. The injury did not arise out of the employment.

8. Warren v. Globe Indemnity Co., 217 La. 142, 46 So.2d 66 (1950); Laine v. Junca, 207 La. 280, 21 So.2d 150 (1945); Rodgers v. Price, 92 So.2d 305 (La. App. 1957); Jinks v. Burton Sutton Oil Co., 44 So.2d 343 (La. App. 1950).

9. The court was early to recognize and has continued to note that no rules can be formulated which would be applicable to every situation. See Edwards v. Louisiana Forestry Commission, 221 La. 818, 60 So.2d 450 (1952); Myers v. Louisiana Ry. & Nav. Co., 140 La. 937, 74 So. 256 (1917); Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923).

communication which was received as an employee and not in relation to private affairs, the trial court found that the injury happened in the course of the employment.[10] It was implied that the hour and place at which the letter was received were immaterial. The court then proceeded to find that the accident arose out of the employment because it was the duty of the deceased to receive official communications, and although this communication was one of unusual character, this duty was still present. The court of appeal, however, found that neither of the requirements were satisfied, but it is difficult to determine what test was applied. It has been suggested that this problem might best be approached by using a "work connection" theory.[11] Under this view the court would make separate inquiries into (1) the time, place, and circumstances of the accident; and (2) into the origin of the risk. If, after considering both factors, there is sufficient connection between the accident and the employment, an award would be justified. This would enable a strong case in one respect to overcome a weakness that might appear as to the other. Whether or not the court of appeal was using such an approach is not apparent from the opinion, but it is submitted that under the work connection theory, the award would have been denied.

An examination of the time, place, and circumstances of receiving the letter leads this writer to conclude that the plaintiff's case as to the requirement that the injury occur in the course of employment was weak. Certainly it would have been strengthened if it had been shown that the deceased was actively at work when he received the communication.[12] On the basis of prior jurisprudence, compensation should be denied in the instant factual situation unless there is a relatively strong showing that the injury arose out of the employment. The risk of receiving a letter of retirement is one to which all employees would be subjected, assuming that their employment continues long enough. The court of appeal did not feel that the statute was designed to protect against injuries which result from risks of this nature, and stated that a holding to the contrary would put every em-

10. The reasoning used by the trial court to find that the accident occurred during the course of employment is difficult for this writer to follow. That the letter was one which was sent from a superior officer to one of his subordinates appears to refer to the origin of the risk rather than the time, place, and circumstances.

11. See LARSON, WORKMEN'S COMPENSATION LAW § 29 (1952).

12. The opinion does not reveal with any certainty where the deceased was when he received the communication, but from the opinion of the trial court the implication is that he was not on duty.

ployer into a quandary as to discharge or forced retirement of his employees. It is interesting to speculate as to what effect a change in the factual situation might have had on the decision. As previously mentioned, had the deceased been actively at work when the letter was received, his argument as to "in the course" would have been strengthened considerably. Had the letter contained material which had more connection with his particular employment, such as the escape of a convict who had threatened him, then the case as to "arising out of" would have been strengthened. It cannot be said that one or both of these factual changes would have resulted in an award of compensation, but certainly in such a case, a stronger argument in favor of such an award would have existed.

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WORKMEN'S COMPENSATION — DEATH BENEFITS — RIGHT OF POSTHUMOUS ILLEGITIMATE TO BENEFIT PAYMENTS

Plaintiff sued for compensation on behalf of her minor child. The father and mother of the child lived together in open concubinage while the father was still legally married to another woman. The child was born eight months after its father was accidentally killed during the course of his employment. The trial court denied recovery but was reversed by the court of appeal.[1] On appeal to the Louisiana Supreme Court, *held,* reversed, two Justices dissenting. Since a posthumous illegitimate is not a member of the family and not actually dependent, he is not entitled to recover compensation benefits under the Louisiana Workmen's Compensation Statute. *Williams v. American Employers Insurance Co.,* 237 La. 101, 110 So.2d 541 (1959).

Under the Louisiana Workmen's Compensation Statute, if an industrial accident causes death within two years, a worker's dependents may receive benefit payments.[2] Dependents are classified as (1) those conclusively presumed to be dependent,[3] and (2) those who must prove actual dependency.[4] Legitimate children, legitimate adopted children, legitimate posthumous children, legitimate stepchildren, and illegitimate children acknowledged under Articles 203, 204, and 205 of the Louisiana

1. Williams v. American Employers Ins. Co., 103 So.2d 568 (La. App. 1958).
2. LA. R.S. 23:1231 (1950), as amended by La. Acts 1956, No. 412.
3. *Id.* 23:1251.
4. *Id.* 23:1252.