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WORKMEN'S COMPENSATION-BURDEN OF PROOF OF CAUSE OF ACCIDENT- PRESUMPTIONS

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WORKMEN'S COMPENSATION—BURDEN OF PROOF OF CAUSE OF ACCIDENT—PRESUMPTIONS—Decedent, who was an employee of respondent, was found dead in respondent's store with a rope around his neck and legs. The doctor found that death was caused by asphyxiation by hanging. The deputy commissioner *held* that petitioner had not sustained the burden of proving that de-

cedent met with an "accident arising out of and in the course of" employment, and that the mere finding of the body of an employee on the premises of an employer will not alone raise a presumption that there was an "accident arising out of and in the course of" the employment.[1] *Dietz v. Eagle Grocery Co.*, (N. J. Dept. of Labor 1936) 184 A. 216.

Under most of the workmen's compensation statutes an employee must have received an injury from an "accident [2] arising out of and in the course of" the employment.[3] The burden is on the claimant to prove that the "accident arose out of *and* in the course of" the employment.[4] Claimants have had less difficulty in proving that the accident occurred "in the course of" the employment in situations like that involved in the principal case, since it is held that the finding of the body of an employee at a place where he was supposed to be during the course of his employment raises a presumption that death occurred "in the course of" the employment.[5] So in those states which do not require that the accident "arise out of" the employment the problem of proof is less difficult.[6] Although by the terms of most of the workmen's compensation statutes tribunals shall not be bound by common law or statutory rules of evidence,[7] and though the acts are to be liberally interpreted,[8] an award cannot be based on surmise or conjecture.[9] However, the burden can be sustained by circumstantial evi-

[1] Relying on the New Jersey Supreme Court decision in Nardone v. Public Service Electric & Gas Co., 113 N. J. L. 540, 174 A. 745 (1934).

[2] There is a presumption that death was accidental and against suicide. Manziano v. Public Service Gas Co., 92 N. J. L. 322 at 326, 105 A. 484 (1918). In Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190 (1935), the Court held that the presumption did not have the quality of affirmative evidence and said through Justice Roberts at p. 286: "Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in claimant's favor."

[3] For a definition of the phrases "arising out of" and "in the course of," see Buckley, L. J., in Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796 at 799, 77 L. J. K. B. 1018; Bryant v. Fissell, 84 N. J. L. 72, 86 A. 458 (1913). For a grouping of the cases and discussion, see Brown, " 'Arising Out Of and in Course of the Employment' in Workmen's Compensation Law," 7 WIS. L. REV. 15, 67 and 8 WIS. L. REV. 134, 217 (1931-32).

[4] 2 SCHNEIDER, WORKMEN'S COMPENSATION LAW, 2d ed., 1863 (1932); L.R.A. 1916A 23 at 241.

[5] 2 SCHNEIDER, WORKMEN'S COMPENSATION LAW, 2d ed., 1855 (1932).

[6] See Flucker v. Carnegie Steel Co., 263 Pa. 113 at 119, 106 A. 192 (1919).

[7] See Sherman, "Evidence and Proof under Workmen's Compensation Laws," 68 UNIV. PA. L. REV. 203 (1919).

[8] L. R. A. 1916A 23 at 215.

[9] 2 SCHNEIDER, WORKMEN'S COMPENSATION LAW, 2d ed., 1820-1821 (1932). An award based on such evidence will be set aside. L. R. A. 1916A 23 at 241-242. As to the conclusiveness of findings and sufficiency of evidence, see L. R. A. 1918F 896 at 915. Rugg, C. J., in Sponatski's Case, 220 Mass. 526 at 528, 108 N. E. 466 (1915), said:

"The dependent must go farther than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. . . . 'It only means that if there is no evidence in his favor upon which a reasonable

dence.[10] Whether the burden has been so sustained seems to depend on whether or not the claimant has proved sufficient facts and circumstances from which the commission can draw a "reasonable inference" that there was an "accident arising out of and in the course of" the employment.[11] When there is no evidence, either direct or circumstantial, to explain the cause of injury, the majority of the decisions are in accord with the case at bar,[12] and it is believed there is really no disagreement as to the rule regarding the burden of proof and the way in which it can be sustained but that the cases apparently in conflict can be distinguished on their facts.

man can act, he will fail.' If the evidence, though slight, is yet sufficient to make a reasonable man conclude in his favor on the vital points, then his case is proved."

[10] L. R. A. 1916A 23 at 242; Vulcan Detinning Co. v. Industrial Comm., 295 Ill. 141, 128 N. E. 917 (1920).

[11] Cases holding that there was sufficient evidence to justify an award: where there was circumstantial evidence that injured was thrown to floor by moving machinery and thereby received his head injury, Patsaros v. John Eichler Brewing Co., 245 App. Div. 873, 282 N. Y. S. 183 (1935); where decedent was found dead below a window and there was circumstantial evidence that he had been knocked from the window by a "sifter" or had fallen from fire escape while getting air, Sparks Milling Co. v. Industrial Comm. 293 Ill. 350, 127 N. E. 737 (1920); where there was circumstantial evidence that decedent had fallen from his elevator while in the performance of his duty and was found dead at the bottom of the shaft, Wischaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993 (1918); and where recovery was allowed even though the body was never found, Western Grain & Sugar Products Co. v. Pillsbury, 173 Cal. 135, 159 P. 423 (1916). Cases denying recovery: Robertson v. North American Refractories, (Md. 1935) 181 A. 223; Daniels v. Union Oil Mill Inc., (La. App. 1935) 161 So. 614.

[12] See Sparks v. Consolidated Indiana Coal Co., 195 Iowa 334, 190 N. W. 593 (1922); Reed v. Sensenbaugh, (Mo. App. 1935) 86 S. W. (2d) 388, in which it was said at p. 392:

"Also, it is held that a mere showing that employee received injuries by accidental means at or near his regular place of employment and during working hours, standing alone, forms no basis for a presumption that the accident arose out of and in the course of the employment.

"In other words, the Compensation Act does not afford accident insurance entitling the workman to compensation for an injury resulting from any and all accidents he might sustain, although he might at the time be engaged in his master's business."

Compare the broad language in Saunders v. New England Collapsible Tube Co., 95 Conn. 40, 110 A. 538 (1920) (where decedent's head was crushed by elevator and there was circumstantial evidence that it was her duty to use the elevator in the performance of her work); and Capital Paper Co. v. Conner, 81 Ind. App. 545, 144 N. E. 474 (1924) (where decedent was killed by interurban at crossing and accounts were found in his pocket which it was his duty to collect in this part of town); and the dictum in Hills v. Blair, 182 Mich. 20 at 28, 148 N. W. 243 (1914).