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Workmen's Compensation - Injury "Arising Out Of" the Employment - Increased Risk as an Exception to Common Hazard Rule

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WORKMEN'S COMPENSATION—INJURY "ARISING OUT OF" THE EMPLOYMENT—INCREASED RISK AS AN EXCEPTION TO COMMON HAZARD RULE—Lightning killed an employee as he was carrying a shovel with a metal scoop over his shoulder while in the course of his employment. Expert testimony indicated that the risk from lightning was increased from a radius of twelve feet for a man six feet tall to a radius of fourteen feet for a man of the same height carrying a shovel. The Michigan Workmen's Compensation Commission granted an award.[1] On appeal, *held*, reversed. Assuming that the employee was in greater danger by carrying the shovel, there also must be proof that this increased degree of risk caused the injury. Inasmuch as there was no evidence that lightning struck between a twelve to fourteen foot radius from the employee, the necessary causal relation between the increased zone of danger and injury was not shown. *Kroon v. Kalamazoo County Road Commission*, 339 Mich. 1, 62 N.W. (2d) 641 (1954).

The statutory requirement that the compensable injury must "arise out of" the employment refers to the causal relation between injury and employment.[2] Although the courts have generally agreed that the common law tort rules as to causation do not apply in workmen's compensation cases, there is no general agreement as to the criterion of the required causal nexus. A number of recent cases follow the so-called "position risk" view.[3] Under this view, the sole fact that the employment brought the employee to the place of danger at the time when the injury occurred furnishes the causal relation.[4] Thus, a court following

[1] MICHIGAN WORKMEN'S COMPENSATION COMMISSION, No. 11,906, March 3, 1953.

[2] "In the course of," on the other hand, has reference to the time, place, and circumstances of the employment. If the "position risk" concept of "arising out of" employment is adopted, the two phrases become so interwoven that no true line can be drawn. See Riesenfeld, "Forty Years of American Workmen's Compensation," 35 MINN. L. REV. 525 at 542 (1951).

[3] See Horovitz, "The Litigious Phrase: 'Arising out of' Employment," 3 NAACA L.J. 15 (1949).

[4] Lightning cases following position risk concept: Aetna Co. v. Industrial Commission, 81 Colo. 233, 254 P. 995 (1927) (farmhand killed while driving a team of horses);

the position risk concept would have granted the award in the principal case inasmuch as the employment had required the employee to be in the area at the time when lightning struck. The more traditional approach is to deny an award if the risk to the employee is a hazard common to the neighborhood, e.g., injury by lightning or other natural elements.[5] Courts following the common hazard approach permit an exception if the work in which the employee engages has subjected him to an increased risk, a danger greater than that found in the community at large.[6] In the principal case, the Michigan Supreme Court has added a requirement to the exception. Not only must the worker prove an increased risk but also he must show that this increase in risk caused the injury. Thus, in the principal case, the beneficiary of the employee proved that there was an increased risk from lightning in carrying a shovel, but award was denied because there was no evidence that this increased risk caused the injury.[7] The Michigan requirement leads to a distinction between cases on the basis of the nature of the increased risk, which may take one of several forms. First, there are cases in which the time of exposure of the employee to the elements is longer than the time of exposure of the community at large, but the proximity of the employee to a lightning-attracting object such as high trees, metal pipes, etc. is no greater than the proximity of the community at large to such objects. Second, there are cases where the employee is closer to a lightning-attracting object than is the community at large, but the time of exposure of the employee to the elements is no longer than the time of exposure of the community. In the cases under the first category, where the increased risk is derived from an additional period of exposure, it is relatively simple for the employee to prove that injury during this additional time period was "caused" by the increased risk; had he not remained in the area of exposure, he would not have been present when lightning struck.[8] In the second category, where the increased risk is derived from proximity to a lightning-attracting object, it is extremely difficult to prove that the increased risk caused the injury.[9] How can it be shown

Giovine v. United Hebrew Cemetery, 263 App. Div. 772, 30 N.Y.S. (2d) 929 (1941); Deziley v. Semet-Solvay Co., 272 App. Div. 985, 72 N.Y.S. (2d) 809 (1947). See also Harvey v. Caddo DeSoto Cotton Oil Co., 199 La. 720, 6 S. (2d) 747 (1942).

[5] The common hazard rule was derived from dicta in McNicol's Case, 215 Mass. 497 at 499, 102 N.E. 697 (1913). For a case expressly repudiating the common hazard test, see Olson v. Trinity Lodge, 226 Minn. 141, 32 N.W. (2d) 255 (1948).

[6] 83 A.L.R. 234 (1933).

[7] It may be suggested that the court did not believe the expert testimony as to the increased zone of danger in the principal case. However, the language of the court supports the analysis given above. "Under the opinion of the expert witness, the shovel became a factor only in the event that the bolt of lightning struck more than 12 or less than 14 feet from [the employee]. An award may not rest on conjecture. Under this record it may not be said that the shovel was a contributing factor to the death of Kroon." Principal case at 10.

[8] See Mixon v. Kalman, 133 N.J.L. 113, 42 A. (2d) 309 (1945).

[9] In a few reported cases it would be possible for the employee to prove that the increased risk derived from proximity to an attracting object caused the injury. See Bales v. Covington, 312 Ky. 551, 228 S. W. (2d) 446 (1950), where an employee, who was

that but for a shovel being carried over the shoulder lightning would not have struck the employee? In states other than Michigan, including those which recognize the common hazard rule and the increased risk exception thereto, there are numerous cases in this second category in which awards are granted although the causal relation between the increased risk and the injury cannot be shown.[10] Workmen's compensation is recognized as social legislation, designed to benefit and protect the worker. The principal case represents an unfortunate decision in that it makes recovery infinitely more difficult for some workers injured by the elements.

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working on a hill near a barn, was injured when lightning struck a nearby tree, followed the roots of the tree to the barn, and ran along the roof of the barn to a point over the spot where he was working. This rare type of case is consistent on its facts with the test enumerated in the principal case, i.e., it could be proved that the increase in risk caused the injury. However, the language of this case supports the view that proof of a greater danger in itself is sufficient to justify recovery.

[10] Fort Pierce Growers Assn. v. Storey, 158 Fla. 192, 29 S. (2d) 205 (1946) (employee struck by lightning while sitting on tool box under a tarpaulin suspended from two high trees); McKiney v. Reynolds and Manley Lumber Co., 79 Ga. App. 826, 54 S.E. (2d) 471 (1949) (employee killed by lightning while leaning against stack of wet lumber); Mathis v. Ash Grove Lime and Portland Cement Co., 127 Kan. 93, 272 P. 183 (1928) (employee killed while walking on railroad track near electric wire); Sullivan v. Roman Catholic Bishop, 103 Mont. 117, 61 P. (2d) 838 (1936) (employee killed by lightning while carrying metal pipes in his hands); Truck Ins. Exchange v. Industrial Accident Commission, 77 Cal. App. (2d) 461, 175 P. (2d) 884 (1946) (carpenter helper struck by lightning while working on a wet roof); U.S. Fidelity and Guarantee Co. v. Rochester, (Tex. Civ. App. 1926) 281 S. W. 306, affd. 115 Tex. 404, 283 S. W. 135 (1926) (employee killed by lightning in open country while digging a ditch for a pipe line).