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WORKMEN'S COMPENSATION WHERE INJURY RESULTS FROM EXPOSURE TO THE NATURAL ELEMENTS

It is the purpose of modern workmen's compensation statutes to give the employee protection from risks connected with his employment.\(^1\) The employer is charged with certain injuries to his workmen without regard to negligence.\(^2\) Workmen's compensation is thus a form of strict liability—a liability limited, however, by the statutes which provide almost uniformly that an award shall be made only when there has been an injury which arises out of and in the course of the employment.\(^3\) As a further limitation, except in states allowing compensation for occupational diseases, it is generally required by statute, either expressly or as construed, that the injury to be compensable must be accidental.\(^4\)

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\(^1\) Schneider, Workmen's Compensation (3d ed. 1941) §3.

\(^2\) Horowitz, Workmen's Compensation (1944) 7.

\(^3\) Brown, Arising Out of and in the Course of the Employment in Workmen's Compensation Acts (1931) 7 Wis. L. Rev. 15, 67; Note (1931) 15 Minn. L. Rev. 742.

\(^4\) For a collection of cases, see (1935) 71 C. J. 562.
The West Virginia statute merely states that disbursements shall be allowed for personal injuries occurring in the course of and resulting from the employment, but the phrase personal injuries has been interpreted to include only injuries of accidental origin. An accident has been judicially defined as a sudden event, unexpected on the part of the workman, and capable of being localized at a definite time and place, as distinguished from an injury occurring gradually within the course of the employment. Thus, injuries caused by the natural elements are compensable if attributable to a specific and definite event, provided they occur in the course of and arise out of the employment.

The words "in the course of" and "arise out of" the employment contain two distinct propositions, the first relating to whether the employee is actually engaged in his employment at the time of the accident and the second relating to the causative act which occasions the injury. In order that compensation may be due, the injury must both arise out of and be received in the course of the employment. Neither alone is sufficient. However, courts construing the statutes have had much difficulty in ascertaining the meaning of the requirement that the injury arise out of the employment.

In the case of In re McNichol, the Massachusetts court said that 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. It excludes an injury which cannot fairly be traced to the employment as a contributory proximate cause and which comes from a hazard to which the workmen would have been exposed apart from the employment. The court thus finds a standard of liability by borrowing the doctrine of proximate

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5 W. VA. CODE (Michie, 1943) c. 23, art. 4, §1.
10 See, e.g., Kansas City Fibre Box Co. v. Connell, 5 F. (2d) 398 (C. C. A. 8th, 1925); cf. (1921) 28 R. C. L. 796, (setting forth some of the conflict and uncertainty in the interpretation of "arising out of" the employment).
cause from the law of negligence, but along with it it brings the tangle of legal confusion which surrounds that phrase. It is seldom that the employment cannot be considered a substantial factor in bringing about an injury, for without his employment the workman would not be present at the time when and place where the injury occurred, but it is generally held that it is not enough to qualify the employee for compensation that his injury occurred in the course of his employment. To be compensable the injury must result from a hazard which is recognized as inherent in the nature of the work as distinct from the general risks of life. Application of this rule as a guide for the grant of an award for injuries resulting from natural forces has been perplexing. An injury is classified as resulting from a natural force when it happens by the direct and immediate operation of the forces of nature uninfluenced by human intervention, and is of such character that it could not have been prevented by reasonable diligence. Risks of injury from natural forces are, in general, risks to which the public as a whole is exposed. If the rule that the risk be inherent in the work is to be satisfied, it must be shown that the employment adds to the risk of injury from such source. Hence, as a requisite for the recovery of compensation, the great majority of courts require a showing that the employee by reason of his duties was exposed to the natural force causing his injury to a greater degree than members of the general public. Guided by this standard, compensation has been allowed for injuries resulting from cyclones and tornadoes, earthquakes, freezing, sunstroke, and lightning, when the

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15 Caswell's Case, 305 Mass. 500, 26 N. E. (2d) 328 (1940); 20 B. U. L. Rev. 586 (1940).
employee has been exposed to them to a greater degree than have members of the general public. Application of the rule, however, is further complicated by the lack of a satisfactory definition for the term “general public.” It cannot be agreed whether the term should include only workmen, and if so whether it should include only those workmen engaged in similar occupations or all workmen whether engaged in indoor or outdoor activity. If the phrase is defined to embrace everyone in the community, the further problem is encountered of ascertaining the extent of the community and the general average of all those within it.

Some courts have tried to avoid the difficulty of determining what injuries rise out of the employment by using a different criterion. In Giocca v. National Sugar Refining Company, the New Jersey supreme court found a method of avoiding this issue. An employee was overcome with heat while sweeping sugar from the floor of an enclosed but well ventilated dock. The temperature at the time was very high but there was evidence that the dock was the coolest place in the vicinity. He was exposed to neither the rays of the sun nor artificial heat, yet his widow was awarded compensation merely because, the court said, the injury was incident to the employment. The court thus obliterated all practical purposes the requirement that the accident arise out of a risk inherent in the employment and left only the requisite that the injury be suffered within the course of the employment. However desirable such a result from the standpoint of definiteness and clarity, it can hardly be justified under the wording of the present statutes requiring the injury to arise out of the employment.

The Massachusetts supreme court, in Caswell’s Case, applied still a different standard. The claimant was injured when an unprecedented storm lifted the roof from the building in which he was working, causing a wall of the building to fall in on him. Compensation was awarded, the court holding that compensation will be given whenever the injury results from physical contact with any object used in connection with the employment. At first blush, the rule here announced, especially because

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22 Wells v. Robinson Construction Co., 52 Idaho 562, 16 P. (2d) 1059 (1932); Deckard v. Indiana University, 92 Ind. App. 192, 172 N. E. 547 (1930); Bauer’s Case, 314 Mass. 4, 49 N. E. (2d) 118 (1943).
of the facility with which it can be applied, seems to be desirable, but its consistent application would produce unjust results. Carried to a logical extreme, employees injured by direct contact with nature would be denied compensation unless their employment exposed them to a peculiar danger of injury from such sources, but an employee injured by the same natural force occurring indirectly by contact with some object used in connection with the employment could recover. Because of this incongruity, it is doubtful that this view will win wide acceptance.

In West Virginia, the cases have been uniform in holding that the injury must arise out of the employment but here as elsewhere what is meant by "arise out of" the employment is far from clear. In *Collett v. Compensation Commissioner*, decedent was overcome with heat while working in a rolling mill. The temperature outside the plant was eighty degrees but the decedent, who was handling forty-pound packs of white-hot metal, was exposed to a much greater heat. In allowing recovery, it was held that heat exhaustion is compensable if it results from special or particular risks or dangers attendant to the employment, to which the general public is not exposed. This rule was again applied in *Rasmus v. Workmen's Compensation Appeal Board*, when compensation was granted for the death from heat exhaustion of a gasoline crane operator. While the temperature at the time of decedent's death was high, the excessive heat was caused in part by the reflected rays of the sun from piles of metal junk surrounding the crane and from heat generated by the crane's engine. Hence it is to be noted that heat exhaustion in this case as well as in the *Collett* case resulted from the combination of a natural force with an artificial condition incident to the employment.

When *Keller v. State Compensation Commissioner* was decided it seemed that the rule was being extended to embrace cases where injury resulted solely from exposure to the natural elements. The decedent suffered a sunstroke while driving spikes in repair of a railroad track leading to the employer's plant. At the time he was overcome the temperature in the vicinity had reached one hundred degrees, and evidence showed that it was much hotter at the place where he was working than elsewhere in the community, because of the reflected rays of the sun from the steel rails and from a nearby building. It was held that the

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29 117 W. Va. 55, 184 S. E. 250 (1936).  
case came within the rule of the Collett and Rasmus cases and that the injury was therefore compensable. While arguably the reflected heat was an artificial condition incident to the employment like the heat from the white-hot metal in the Collst case, and from the engine in the Rasmus case, still the court did not indicate that decision rested upon that theory. All the heat, direct and reflected, was generated by the sun's rays, so it would appear that the court meant to allow recovery for death caused by a natural force alone. Here, as in the earlier cases, the court made necessary a showing that the risk from which the injury resulted be greater to the workman because of his employment than to members of the general public, and the general public was defined by the court as consisting of all persons in the vicinity of the place of employment.

If the Keller case was authority for the proposition that compensation will be given for injuries caused by the natural elements when the employee is exposed to a greater risk of injury from such source than are other persons in the neighborhood, its authority was short lived. In Williams v. State Compensation Commission,\(^{31}\) the decedent, while working on a scaffold on the side of a building, lost consciousness and died shortly afterwards. Compensation was claimed on the theory that, since the decedent was more exposed to the sun's rays by reason of his working on the building than was the general public, his death resulted from a risk inherent in the employment and was therefore compensable. While again expressing the general rule that the injury is compensable if it results from a risk inherent in the employment, the court held the risk to which the decedent was exposed was not of that nature. While admitting that the facts in the Keller case were closely analogous to those presented, the court merely states that the type of heat reflected from steel rails was different enough from heat reflected from roofs to distinguish the two cases. Such a distinction would be difficult for a layman, or indeed a lawyer, to comprehend.

Compensation should be allowed in either case when the injury results from a risk inherent in the employment and greater than that to which other persons in the community are exposed.\(^{32}\) It would appear, however, under the court's own definition of general public in the Williams case, that compensation would have to be denied whatever the type of heat causing death. It is said that the injury must not only be caused by some particular risk connected with the employment, but it

\(^{31}\) 127 W. Va. 78, 31 S. E. (2d) 546 (1944).

must be beyond that to which those employed under substantially similar conditions are subjected. Had this rule been applied in the Collett case, the claimant would have been entitled to no compensation if other men had been engaged with the decedent in handling the hot metal, since he then would have been exposed to no risk beyond that to which others employed under substantially similar conditions were subjected. Likewise, in the Rasmus case, compensation under this rule would have been denied if other persons had been employed to operate cranes under circumstances substantially similar to those under which the decedent operated his crane. The application of such a rule will greatly restrict the number of injuries for which compensation is recoverable under our statutes. To qualify for compensation in the future, it will be necessary to show that the injured person was exposed to a risk in a degree that affected him only. It no longer satisfies the statute to show that the injury results from a risk incident to the employment and greater than that to which the general average of persons in the community were subjected. Judge Kenna, in a concurring opinion, strongly dissented from the position taken by the majority that the phrase "general public" should be confined only to those who are engaged in activities substantially similar to those in which the injured employee was engaged. The workmen's compensation statute, he says, should not be so construed as to exclude employees who, while exposed to risks in no greater degree than their fellow employees, are nevertheless exposed to a greater degree than the general public in the same neighborhood. If our statute is to provide any appreciable protection for workmen injured by natural forces, a broader definition of "general public" than that adopted by the majority in the Williams case must be formulated. Legislation imposing absolute liability upon employers for injuries to workmen which are in any way related to the incidents of employment would immeasurably facilitate administration of the compensation acts. This may perhaps be the only solution to the perplexing problem of causation embedded in the clause "arise out of" the employment. Until such legislation is enacted, courts should strive to remedy the present unsatisfactory status of the "general public" standard by carefully defining the elements that constitute that standard, at the same time keeping in mind

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33 See Williams v. State Compensation Comm'r, 127 W. Va. 78, 90, 31 S. E. (2d) 546, 552 (1944) (concurring on the ground that the record did not show that the decedent was exposed to unusual heat).

34 Cf. Cudahy Packing Co. v. Parramore, 263 U. S. 418 (1923) (indicating that Fourteenth Amendment due process would be satisfied when the injury relates in any way to an incident of the employment).
the primary purpose of workmen's compensation acts to compensate workmen for industrial injuries.\textsuperscript{35}

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\textsuperscript{35} Staton \textit{v.} Reynolds, 58 F. Supp. 657 (W. D. Ky. 1945); Magma Copper Co. \textit{v.} Gonzales, 62 Ariz. 9, 152 P. (2d) 618 (1944); Paul \textit{v.} Glidden Co., 114 Md. 309, 39 A. (2d) 544 (1944); United Air Lines Transport Corp. \textit{v.} Industrial Comm., 107 Utah 52, 151 P. (2d) 591 (1944); Eagle River Building & Supply Co. \textit{v.} Peck, 199 Wis. 192, 225 N. W. 690 (1929), (1930) 5 Wis. L. Rev. 381.