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Workmen's Compensation--Arising Out of Employment--Fall Caused by Idiopathic Seizure

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refused to testify at a trial, even though he had done so before the grand jury, was an attorney who well could be presumed to know of his privilege against incriminating himself, certainly to a greater degree than would the ordinary layman. Indeed, what end of justice is served by allowing a witness to waive and to invoke successively the privilege against self incrimination however and whenever it suits his convenience?

But query as to the wisdom of the application of this argument in fact situations where it is apparent that the witness' position has *changed* from the time that he testified before a grand jury to the time that he was called to the stand in the subsequent trial. For example, in *Temple v Commonwealth*²⁶ the witness had gone into the grand jury room without having consulted counsel, knowing nothing about his privilege. It was only upon securing the advice of counsel that he learned of his right not to incriminate himself, and consequently refused to testify at the trial. Certainly in such a case the rule of the confinement of the waiver of the privilege to the particular proceeding in which such waiver was made seems to be a fair one.

In the *Neff* case itself, the setting in which the questions at the grand jury hearing were asked had changed to such an extent, the witness having been convicted of perjury in the meantime, that here too the imposition of this rule of confinement of the waiver seems to be the only fair approach. Thus, the attitude of the courts, as illustrated in *In re Neff*, seems to be to continue to place the desirability of protecting the witness on the stand far above any advantage, slight at best, that could be gained from a relaxation of such protection.

Andre V Tolpegin.

WORKMEN'S COMPENSATION ARISING OUT OF EMPLOYMENT—FALL CAUSED BY IDIOPATHIC SEIZURE.—In a recent California case¹ an employee, while walking down an aisle on his employer's premises, had an idiopathic seizure which caused him to fall and strike his head on the floor. Granting that the seizure was not connected with the employment, a four to three decision nevertheless held that the injury arose out of the employment. The floor was said to be a "condition incident to the employment" and a contributing cause of the injury. The decision has placed California in the foremost ranks of those states which have liberally defined a compensable injury.²

In order for an injury to be compensable, the Workmen's Compensation Act³ requires that it be one "arising out of and in the course of employment" and "(c) is proximately caused by the employment." The phrases "arising out of" and "proximately caused by" from an early time have been considered to be practically synonymous.⁴ However, "arising out of" and "in the course of" were not so intended. The first Workmen's Compensation Act, passed in 1911,⁵ compensated an injury if it

²⁶75 Va. 892 (1881)

¹Employer's Mut. L. Ins. Co. v. Industrial Acc. Com., 41 A.C. 693, 263 P.2d 4 (1953)

²In the following cases compensation was awarded on identical facts: *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 Atl. 599 (1937), *Pollock v. Studebaker Corp.*, 97 N.E.2d 631 (Ind.App. 1951), *Garica v. Texas Indemnity Ins. Co.*, 235 Tex. 217, 209 S.W.2d 333 (1948), *General Insurance Corporation v. Wickersham*, 235 S.W.2d 215 (Tex.Civ.App. 1950)

³CALIF. LABOR CODE § 3600.

⁴*Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212 (1916), *Kimbol v. Industrial Acc. Com.*, 173 Cal. 351, 160 Pac. 150 (1916)

⁵CALIF. STATS. 1911, c. 399, p. 796.

merely occurred in the course of employment. Two years later, although not required by the Constitution,⁶ the second prerequisite was added.⁷ During thirty years of liberal construction, as required by the legislature,⁸ the meaning of "arising out of the employment" has undergone radical alteration.

An early leading case⁹ approved the following definition:

"It [the injury] arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would be equally exposed apart from the employment."

It has often been recognized and emphasized that the concept of proximate cause as used in tort law is not controlling in industrial accident cases and that reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee.¹⁰ Even with this concession, it would appear startling to say that an injury¹¹ resulting from a fall to the level ground should have been contributed to by the employment when the fall was precipitated by an epileptic fit purely personal in origin. The effects of such a fall would be no different from those which would result if the employee were standing on the level ground at any other place when the seizure occurred. However, the decision reached here appeared to the majority to be a natural and insignificant extension of the principle enunciated in earlier cases.

In the first California case involving an idiopathic fall compensation was denied.¹² Because of an epileptic fit an employee fell from a scaffold thirty-nine feet above the ground. The court declared that the injuries did not arise out of the employment because there was nothing in the work which would tend to bring on the fit. It was emphasized that the height contributed to the extent of the injuries, but it did not contribute to the fall. Soon afterwards it was recognized that a condition of the employment did not have to cause the seizure as long as it contributed to the injuries. It was thus held that injuries attributable to a fall from a height would arise out of the employment on the theory that it placed the employee in position which increased the dangerous effects of the fall.¹³

In other situations the same theory has since been used to find the necessary employment connection. Thus an injury arises out of the employment when a truck driver

⁶CALIF. CONST. A., Art. XX, § 21, requires only that the injury be "sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

⁷CALIF. STATS. 1913, c. 176, p. 279.

⁸CALIF. LABOR CODE § 3202.

⁹*Kimbol v. Industrial Acc. Com.*, *supra* note 4 (employee dishwasher in a restaurant was injured when the floor above suddenly gave away).

¹⁰*Truck Ins. Exchange v. Industrial Acc. Com.*, 27 Cal.2d 813, 816, 167 P.2d 705, 706 (1946)

¹¹Meaning traumatic injuries resulting from the fall as distinguished from the internal effects of the seizure, which of course are not compensable.

¹²*Brooker v. Industrial Acc. Com.*, 176 Cal. 275, 168 Pac. 126, L.R.A. (N.S.) 1918F, 878 (1917). The present situation was foreseen in a quote from a Michigan case: "We do not think it would be seriously contended that, had he fallen in an epileptic fit while standing on the floor and received the injury he did, the injury arose out of the employment, and that the defendant was liable." *Id.* at 277, 168 Pac at 127.

¹³*See California Notion & Toy Co. v. Industrial Acc. Com.*, 59 Cal.App. 225, 229, 210 Pac. 524, 526 (1922) (compensation denied because no injuries resulted from the fall), *Pacific Telephone and Telegraph Co. v. Industrial Acc. Com.*, 19 I.A.C. 106 (1933) (heart attack caused telephone lineman to fall 17 feet to the ground).

has an epileptic fit or a heart attack and as a result has an accident¹⁴ or is thrown out of the vehicle and run over by its wheels.¹⁵ The same result follows when an employee working near a saw horse falls and strikes his head on it.¹⁶ In other jurisdictions falls occurring in the course of employment into such common household objects as tables¹⁷ and bookcases¹⁸ have likewise been compensable.

The basic theory of the above cases is that although the cause of the fall was originally a personal one, employment conditions contributed some hazard which led to the final injury. In the principal case the court made the natural extension and found an ordinary bare floor to be a contributing condition of the employment. It did not directly designate the floor as a hazard, but it failed to see any valid distinction between a fall from a height or into an object and a fall to the floor. The reasoning of the court is appealing. In either case the object encountered in the fall was not conspicuously different from what may be found at home, and it has been conceded that the condition does not have to be peculiar to the employment in the sense that it would not have occurred elsewhere.¹⁹ The other arguments used to bolster the decision were: (1) It is not necessary for the injury to be of a kind anticipated by the employer; (2) The Act is to be liberally construed, (3) All doubts are to be resolved in favor of granting compensation.

Now that the decision has been made the question remains as to where the dividing line will be drawn in future idiopathic fall cases. It appears that a fall to a thick and well cushioned carpet in the employer's office would be compensable under this decision. The same extension as was made here would be almost inevitable. It would be argued that there is no valid distinction between a fall to a bare floor and a fall to a carpeted floor. The carpet would be established as a condition incident to the employment and as a contributing cause of the injury. This conclusion would result from forgetting the underlying principle of the Workmen's Compensation Act and deciding the case on precedent alone. Since the statute requires that the injury arise out of the employment, the employment must in some way aggravate it, especially when its origin is so personal in nature. But in the above example the employment would not increase the risk of such a fall. It would substantially diminish it and yet compensation could be awarded. A commentator,²⁰ who suggested the above *reductio ad absurdum*, has also supplied a means of escaping it. This can be done, and with supporting authority,²¹ by making the hardness of the floor the peculiar condition or hazard incident to the employment. Although the distinction is fine, the statutory requirement can still be retained and the judiciary will not be legislating. As a basis for distinguishing future cases of falls into inner-spring mattresses or soft sand piles it can be noted that the floor here was concrete.

¹⁴Laurence v. Jarrett, 7 Cal. Comp. Cases 83 (1941)

¹⁵George L. Eastman Co. v. Industrial Acc. Com., 186 Cal. 587, 200 Pac. 17 (1921)

¹⁶National Automobile and Casualty Ins. Co. v. Industrial Acc. Com., 75 Cal.App.2d 677, 171 P.2d 594 (1946)

¹⁷Connelly v. Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76 (1942)

¹⁸Tavey v. Industrial Com. 106 Utah 479, 150 P.2d 379 (1944)

¹⁹Pacific Employer's Ins. Co. v. Industrial Acc. Com., 26 Cal.2d 286, 158 P.2d 9, 159 A.L.R. 313 (1945) (injury due to horse-play of fellow employees), Pacific Employers Ins. Co. v. Industrial Acc. Com., 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798 (1942) (traveling salesman contracted San Joaquin Valley fever while in the valley in the course of employment)

²⁰1 LARSON'S WORKMEN'S COMPENSATION LAW 165 (1952)

²¹Wright & Greig, Ltd., v. M'Kendry, 56 Scot.L.R. 39, 11 B.W.C.C. 402 (1918) "In this case I think the workman was by the condition and incident of his employment engaged at the time of the accident at a place of special danger, because but for the hard concrete floor the fatality would not or might not have occurred." *Id.* at 41, 11 B.W.C.C. at 405.

The dissent found the floor not to be a peculiar condition or hazard incident to the employment. It would refuse to find a causal connection beyond cases of falls from heights or into objects occurring in the course of employment. However, the dissenting opinion's conclusion that the result of the majority decision is to make compensable every injury arising out of an idiopathic seizure and in effect to eliminate the requirement of "arising out of the employment" is not warranted. The employee herein suffered traumatic injuries. The majority did not hold that internal injuries caused solely by the fit would be compensable as long as they occurred in the course of employment.

In future idiopathic fall cases the line must be drawn somewhere. As long as the requirement of "arising out of the employment" still remains, the statute will not permit the award of compensation unless the employment contributes in some way to the injury. The environment must supply a hazard which, when added to the idiopathic fall, produces the ultimate injury. The Workmen's Compensation Act was enacted to relieve the workman of the hardship of pursuing his common law remedy and to make any injuries caused by industry, whether accompanied by negligence or not, an expense to be borne by industry and the consumers of its products.²² It was not intended to provide health and accident insurance, nor to make the employer the insurer of his employees.²³ If it cannot be found that industry has contributed to the injury it should not be required to pay for the injury. In addition, a possible result of the extension of the idiopathic fall doctrine, not much discussed in the cases, may be to cause employers to deny employment to those with a history of an idiopathic condition.

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²³Larson v. Industrial Acc. Com., 193 Cal. 406, 409, 224 Pac. 744, 746 (1924).

²²Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 693, 151 Pac. 398, 401 (1915).