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Workmen's Compensation—Scope of Employment

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raised by the Workmen's Compensation Law,[10] were sufficient to offset the Appellate Division's ruling, as a matter of law, that the employment was so unrelated to and remote from New York that the Workmen's Compensation Board had no jurisdiction.[11]

Timeliness of Application

Hengel v. Federici[12] was concerned with the length of time within which a claim for reimbursement from the Workmen's Compensation Special Disability Fund must be filed. The statute sets forth 104 weeks from the date of the disability as the time limit within which an employer must file in order to receive reimbursement.[13] In the instant case the Workmen's Compensation Board erroneously established August 22, 1947, as the date of the injury rather than April 15, 1947, the actual date of the employee's injury. Claim for reimbursement was not made by the employer's insurance carrier until June 22, 1949, but the carrier claimed that it should not be barred from reimbursement because of the Board's erroneous original determination. Without deciding whether under other circumstances the failure to file within the 104 week period might not preclude reimbursement, the Court disallowed the carrier's claim because the carrier had ample notice of the date of actual injury, and the Board's erroneous determination in no way affected the carrier's notice of the correct date.

Scope of Employment

A. In *Miller v. Bartlett Tree Expert Co.*,[14] a supervisory employee in the tree surgery business was directed by his employer to attend an annual conference which included both daytime and evening sessions. While working outside during an afternon session, claimant became dirty due to the handling of soil. As he was preparing to attend the evening session, he slipped in the shower, incurring an injury.

The Court held (5-2), without citing any authority, that the injury was compensable. The Court reasoned that, since his presence and participation were commanded by his employer at both day and evening sessions and the shower was taken between the two sessions, it "necessarily" arose out of and in the course of his employment.[15]

10. N. Y. WORKMEN'S COMPENSATION LAW, §21 provides that:
> In any proceeding, there is a presumption that the claim comes within the provision of the chapter which can be rebutted by substantial evidence to the contrary.

11. Nashko v. Standard Water Proofing Co., 4 N.Y.2d 199, 173 N.Y.S.2d 565 (1958).
12. 4 N.Y.2d 176, 173 N.Y.S.2d 291 (1958).
13. N. Y. WORKMEN'S COMPENSATION LAW §15(8).
14. 3 N.Y.2d 654, 171 N.Y.S.2d 77 (1958).
15. N. Y. WORKMEN'S COMPENSATION LAW §10.

The dissent argued that the taking of a bath was an act of personal hygiene and should not be compensable. It pointed out that compensation was denied a salesman who was injured while showering after he had set up a display in his hotel room.[16] Compensation was also denied a claimant who injured her eye while combing her hair as she was preparing to go to lunch.[17] However, these cases may be distinguished from the instant case in that they concerned acts of a purely personal nature, not caused by the employment. In the instant case, the very nature of the work caused the claimant to become dirty and the showering was necessary in order to continue his job.[18]

B. In *Pasquel v. Coverly*,[19] another case concerning scope of employment, a bookkeeper was sent by his employer to a branch office seventy-seven miles away, for the day. After finishing work for the day, at about 5:00 p.m., he drove to a relative's home for dinner. In the evening, he and a friend went shopping for a car and then proceeded to a tavern where they had "several" drinks. They then returned to his relative's home where they played cards until 3:00 a.m., when he left for home. He was killed when his car went off the road at about 5:30 a.m. about one mile from his home. There was no evidence of any defect in the deceased's car.

The Court held (5-2) this death to be non-compensable as "the trip lost its identity as part of the decedent's employment" and thus did not arise out of the scope of his employment.[20] The majority reasoned that the risks created by the deviation were operative in producing the accident. Thus the trip was materially different than if he had traveled home without spending the night in personal activities of this nature. The deviation "will weigh heavily on the side of non-compensability" where it was operative in causing the accident.[21] One does not re-enter his employment after deviation merely because he returns to the usual route.

In the *Van De Carr*[22] case, the deceased had been returning home from business on his usual route when the accident occurred. He had deviated from his territory earlier and had had a few drinks. The Court held that the deviation so contributed to the accident that death was non-compensable.

It is well established that if the deviation is operative in causing the injury,

16. Davidson v. Pansy Waist Co., 240 N.Y. 584, 148 N.E. 715 (1925).
17. Schultz v. Nation Associates, 281 App. Div. 915, 119 N.Y.S.2d 673 (3d Dep't 1953).
18. See Sexton v. Public Service Commission of the City of New York, 180 App. Div. 111, 167 N.Y. Supp. 493 (3d Dep't 1917).
19. 4 N.Y.S. 2d 28, 171 N.Y.S.2d 848 (1958).
20. N. Y. WORKMEN'S COMPENSATION LAW §10.
21. LARSON, WORKMEN'S COMPENSATION LAW §19.61 (1952).
22. 282 App. Div. 902, 124 N.Y.S.2d 833 (3d Dep't 1953).

than the trip will be deemed to have lost its identity with the employer's business and the injury will be held noncompensable. This identity theory quoted from the lower court's dissent is no more than the causality test applied by the majority. The theory questions the causal relation between the deviation and the accident.

The dissent based its decision solely on the legislative directive that "the decision of the board shall be final as to all questions of fact."[23] The Court may overrule the Workman's Compensation Board as a matter of law, but where the issue is a debatable question of fact, the decision of the board is final.[24]

The majority and the dissent do not differ as to the law or the test, but merely as to the causal relation between the deviation and the accident. The majority held that reasonable men could not differ as to the causal relation between the two, while the dissent believed that they could.

23. N. Y. WORKMEN'S COMPENSATION LAW §20.
24. Simmons v. Otis Elevator Co., 268 App. Div. 808, 4 N.Y.S.2d 563 (3d Dep't 1944).