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WORKMEN'S COMPENSATION — ASSAULT BY CO-EMPLOYEE

Claimant was assaulted shortly after termination of an exchange of offensive epithets and jostling with a co-employee, such exchange resulting after claimant's injection into a vituperative conversation between this co-employee and a new employee, claimant's working associate. *Held* (2-1): Dismissal on motion affirmed on grounds that an injury derived from horse-play or skylarking is not compensable. *Cierpial v. Ford Motor Co.*, ___ N. J. Misc. ___, 107 A. 2d 61 (1954).

New Jersey allows recovery for assaults upon employees where the assault was intentional, and it can be shown that the claimant was in the performance of his work and was not the aggressor. *Barnese v. Standard Silk & Dyeing Co.*, 10 N. J. Misc. 1290, 163 Atl. 439 (1932); *aff'd*, 110 N. J. L. 565, 166 Atl. 179 (1933) (Watchman killed while separating two fighting employees); *Mayes v. Walter Kidde Constructors*, 21 N. J. Misc. 19, 29 A. 2d 722 (1943) (Employee turned away after an argument over performance of work and was assaulted).

Compensation is denied where the assault is the result of horseplay, *Hulley v. Moosbrugger*, 88 N. J. L. 161, 95 Atl. 1007 (1915) (Employee fell while avoiding a playful gesture of a co-employee); or is actuated by personal causes, *Yoma Kenzi Yoshida v. Nichols*, 12 N. J. Misc. 197, 170 Atl. 824 (1934) (Argument over employment duties by two house-servants resulted in an assault five days later); where the injured employee is the aggressor, *Merkle v. Gillespie Co.*, 10 N. J. Misc. 1081, 162 Atl. 250 (1932) (Employee injured by another defending himself against the former's assault); and where the injured employee provokes the assault, *Lindsay v. Hoffman Beverage Co.*, 19 N. J. Misc. 356, 19 A. 2d 824 (1941) (Employee assaulted during an argument in which he used threatening and abusive gestures and language).

The majority's reasoning in the instant case is that since the claimant became involved in an argument of a personal nature, it cannot be concluded that this interruption was for the protection of a fellow employee. The rules barring recovery for horseplay or personal arguments thus preclude recovery by the claimant as a matter of law. The dissent urged that some evidence that the claimant had orders to supervise the new employee, and evidence that cessation of labor by the new employee necessarily prevented the claimant from working, were sufficient to make a *prima facie* case that the assault arose out of and in the course of the employment. Upon a motion to dismiss at the conclusion of the petitioner's case, the evidence together with all reasonable inferences deducible therefrom must be resolved in the petition-

er's favor. N. J. S. A. 34:15-1 *et seq.* It would seem that under this test of a *prima facie* case, the dissenting judge's reasoning is more cogent than the majority's resolution of the evidence.

New York, which reflects the majority viewpoint, construes the Workmen's Compensation Act liberally to allow recovery for injuries arising out of the risks of association with fellow employees and conditions thereof. *Leonbruno v. Champlain Silk Mills,* 229 N. Y. 470, 128 N. E. 711 (1920) (Employee struck in the eye by an apple thrown in sport by a co-employee at another). Similarly, an injury suffered by an employee moved by some cause aside from his regular duties may be considered an inevitable, however undesirable, result of the employment. *Verschleiser v. Joseph Stern & Son, Inc.,* 229 N. Y. 192, 128 N. E. 126 (1920) (Recovery allowed where an employee, falsely believing a fellow employee was annoying him, assaulted the co-employee and was himself injured in a return attack); *Carbone v. Loft,* 219 N. Y. 579, 114 N. E. 1062 (1916) (Recovery allowed where, forty-five minutes after an argument, claimant was assaulted by a co-employee).

The apparent decisional conflict between New York and New Jersey arises from differing views as to the duty of the employer. The majority held in the instant case that an employer has no duty to see to it that his employees do not assault one another, either willfully or sportively. When one employee assaults another, he is guilty as an individual tort-feasor, and the employer is not responsible. New York and the majority of jurisdictions contend, however, that the risks of association with fellow employees and conditions thereof are risks of the employment, thus placing the duty upon the employer to compensate for injuries resulting therefrom. *Leonbruno v. Champlain Silk Mills, supra.* The New Jersey rule, which is shared only by Missouri, has been criticized as combining the concepts of *foreseeability* and *arising out of the employment,* which two cannot be intermingled, the former being derived from the realm of fault, and the latter from the realm of work connection. 1 LARSON, WORKMEN'S COMPENSATION LAW, 47-48 (1952).

The majority decision in the instant case appears unfortunate in view of the general rule concerning the test to be applied in determining the result of a motion to dismiss. It is also to be criticized as another illustration of the New Jersey policy requiring a claimant to prove a duty upon the employer in an area where the criterion for finding such a duty should be, as it is generally held, the existence of a factual connection between the injury and the employment.

After completion of this note the instant decision was reversed by the Supreme Court of New Jersey. *Cierpial v. Ford Motor Co.,* ___ N. J. ___, 109 Atl. 666 (1954).

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