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Workmen's Compensation—Injuries Arising out of and in Course of Employment—When Does Horseplay Amount to Abandonment of Employment?

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ployer, nor is the employer's claim truly his own—both derive their actions from the employee, assumed here to be free from contributory negligence. And the bulk of the recovery against third parties does accrue to the employee, whatever the benefits going to the employer. If the employer's negligence were to bar "subrogated" third party actions by him or his carrier, one of the main incentives to such actions would disappear, with the employee the ultimate loser, and with a resulting increase in the cost of compensation.

In the present case, under the existing statutes, to relieve the owner of liability because of his remoteness or because, thus, the employer's negligence might otherwise be forgiven, would deprive the injured employee of all common law claims, leaving him only compensation. This the court was unwilling to do, possibly because compensation schedules so largely fail to actually compensate injured workmen.

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WORKMEN'S COMPENSATION — INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT — WHEN DOES HORSEPLAY AMOUNT TO ABANDONMENT OF EMPLOYMENT?

As permitted by his employer, claimant left the department where he worked five minutes before quitting time, and went to another department for the purpose of securing a ride to his home with a friend and fellow employee. The fellow employee offered him a drink from a bottle labelled "Gin." Claimant stepped out of sight and took a drink. The bottle in fact contained poisonous carbon tetrachloride which the fellow employee had secured from the employer for his personal use. Under the employer's contract with the plant union, possession of or drinking liquor on the premises at any time was cause for immediate dismissal. Claimant admitted that he had been given a copy of the contract, but would not admit that he had read it. There had been no drinking in the plant previously. The Workmen's Compensation Board found that claimant's injuries arose out of and in the course of his employment. The Appellate Division affirmed. *Held* (4-3): affirmed. Claimant's conduct did not amount to an abandonment of employment as a matter of law. A violation of the no-drinking rule should be treated no differently for the purposes of compensation than the violation of any other rule designed to improve plant efficiency and to safeguard employees. Claimant, although he participated in the event, was an innocent victim of another's horseplay. *Matter of Burns v. Merritt Engineering Co.*, 302 N. Y. 131, 96 N. E. 2d 739 (1951).

The New York courts have long displayed a liberal attitude toward the administration of the Workmen's Compensation Law. The present decision, while

it displays again that attitude, possibly to the point of abdication, raises some questions as to the theory underlying the allowance of awards in prank or "horseplay" cases.

The Workmen's Compensation Law §10 states that the employer shall compensate his employees for injuries "arising out of and in the course of employment." The application of this definition to conduct commonly called "horseplay" was established as early as 1920 in a decision by Judge Cardozo: " 'For workmen . . . to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor.' The claimant was injured not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment." *Matter of Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 471, 128 N. E. 711 (1920). That case upheld an award to a non-participating "innocent victim". But it became apparent that all victims of horseplay would not recover when, just three years later, the Court of Appeals held that the instigator of the horseplay, injured when his prank backfired, could not recover. *Matter of Frost* v. *H. H. Franklin Mfg. Co.*, 236 N. Y. 649, 198 N. E. 521 (1923), *aff'g* 204 App. Div. 700, 198 N. Y. Supp. 521. See also *Matter of Gaurin v. Bagley and Sewall Co.*, 298 N. Y. 511, 80 N. E. 2d 660 (1948). Later, it developed that this, also, was not universally so. When it had been customary for the employees to engage in a seeming diversion, it was held that the conduct had become an incident of the employment and injury resulting therefrom was compensable. *Matter of Industrial Commissioner* (Siguin) v. *McCarthy*, 295 N. Y. 443, 68 N. E. 2d 434 (1946). See also *Matter of Ognibene* v. *Rochester Mfg. Co.*, 298 N. Y. 85, 80 N. E. 2d 749 (1948). Very likely, one who voluntarily participated in the prank, but who was not the instigator of it in a true sense, would nevertheless be covered by the above cases. He would stand in about the same position as the instigator. Cf. *Matter of McCarthy* v. *Remington Rand, Inc.*, 300 N. Y. 715, 92 N. E. 2d 58 (1950).

An attempt to fit these decisions into a workable pattern might easily lead to differentiations hinging upon whether the claimant was the "instigator" of the prank or an "innocent victim" or, if he was the instigator, on whether the conduct was "customary." Cf. Note, 34 CORNELL L. Q. 460 (1949). Possibly, support for this process of categorizing can be found in the majority opinion in this case. 96 N. E. 2d at 739. But such an approach is apt to produce distinctions which are purely superficial, since it tends to direct the attention away from the statutory definition — injuries "arising out of and in the course of" employment. The following is suggested as an alternative, and seems to be supported by the decided cases. The claimant's recovery in a horseplay case is not dependent, it would seem, upon the position which he occupies

with relation to the *prank*. As to this, it may be significant that thus far there has been no discussion in horseplay cases of the statutory exception of injuries resulting from the wilful intention of the injured employee to bring about injury or death of himself or another. Work. Comp. Law § 10. Cf. *Matter of Stillwagon* v. *Callan Bros., Inc.*, 183 App. Div. 141, 170 N. Y. Supp. 677, *aff'd*, 224 N. Y. 714, 121 N. E. 893 (1918) (an assault case). Rather, given conduct of the horseplay type, recovery depends upon the position in which he stands with relation to his *employment*. For example, the non-participating victim recovers because he has not left his assigned job at the time he is injured. On the same reasoning, the instigator normally does not recover, because his act, in the usual case, amounts to an abandonment. But sometimes he does recover. And when he does, the reason given is that his act, though of the horseplay type, exists under the circumstances as an incident of the employment. His indulgence in it does not constitute an abandonment; the injury does arise "out of and in the course of" his employment. Cf. *Matter of Ognibene v. Rochester Mfg. Co., supra,* and *Matter of Industrial Commissioner (Siguin)* v. *McCarthy, supra*. If this is the underlying theory, its application was especially necessary in the instant case. Insofar as this claimant was injured by an entirely unexpected force with which he had nothing to do, he was admittedly the "innocent victim" of another's horseplay. But that was not all. At the time he was injured, he himself was engaged in activity of the horseplay type. If that amounted to an abandonment of employment, he was not entitled to compensation benefits.

It is far from clear that the court, in the instant case, did look primarily to claimant's position with relation to his employment. There is some language to the effect that claimant "was not injured because he violated a rule of the plant, but, on the contrary, because he was the innocent victim of a cruel and senseless joke." 96 N. E. 2d at 741. If, as the dissenters argue, this means that claimant could recover merely because he was an "innocent victim", without regard to his position at the time he became such, it would seem clearly erroneous. He could hardly receive an injury "arising out of" his employment if he were not engaged in that employment, and discussions of causation would not meet the issue. But abandonment is discussed, specifically, with regard to violation of the rule and certainly enters into the decision.

The court's justification of the Board's finding of no abandonment involves two extensions of earlier decisions and deserves mention. It has long been settled that the violation of some rules, such as those prescribing the manner of performance of jobs or calling for the use of safety devices, does not amount to an abandonment of employment. See, e. g., *Matter of Chila* v. *New York Central R.R.*, 251 App. Div. 575, 297 N. Y. Supp. 850, *aff'd*, 275 N. Y. 585, 11 N.E. 2d 766 (1937); *Matter of Brenchley* v. *International Heater Co.*, 227 App. Div. 831, 237 N. Y. Supp. 773, *aff'd*, 254 N. Y. 536, 173 N. E. 854 (1930). Here the

court drew an analogy to those cases. Certainly the analogy is not a close one. Claimant's act was far from a short-cut taken in his employer's business. But cf. *Matter of Wilson* v. *General Motors*, 298 N. Y. 468, 84 N.E. 2d 781 (1949) (recreation case). Perhaps even more significant is the treatment given the element of forseeability of the prank, if any, in which claimant was engaged at the time he was injured. Earlier cases allowing recovery to a claimant who was actually engaged in a prank all involved some element of forseeability, either because of a custom, *Matter of Industrial Commissioner (Siguin)* v. *McCarthy, supra,* or for example, a spirit of festivity, *Matter of McCarthy* v. *Remington Rand, Inc., supra.* In this case, that element was lacking. The court's answer was that it was not absolutely essential, but just "important." Perhaps the court is approaching in this indirect way the position of Judge Desmond dissenting in *Matter of Ognibene* v. *Rochester Mfg. Co., supra,* that a claimant should recover if his act is merely an insignificant antic, even though he can be tabbed an "instigator."

If injuries resulting from pranks were uncommon, the court's continuing to decide upon a distinction-by-distinction basis might be satisfactory. But such injuries are not uncommon. And it would seem that there are enough decisions now so that, if there is an underlying theory, it could be stated. If an "instigator" is denied recovery because he is an instigator, then the exceptions under which he may be allowed to recover require fuller explanation. On the other hand, if "instigator" serves merely to associate him with an act amounting to an abandonment, then it should be pointed out that that is the meaning intended and that, the reason being more basic, recovery will be allowed if the act does not amount to abandonment. In dealing with these problems, the primary consideration is the statutory test — whether the injury arose out of and in the course of employment. Keeping this in mind, it is submitted that the proper approach is to look primarily at the conduct in which claimant was engaged at the time he was injured and only secondarily at his position with relation to the injury producing prank. The present decision, because of the obscurity of its reasoning, probably presents no obstacle to such an approach.

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