Hastings Law Journal

Volume 8 | Issue 1 Article 4

1-1956

Workmen's Compensation: Meaning of the Phrase Arising Out of Employment as Used in the California Labor Code

Albert Bianchi

COMMENTS

WORKMEN'S COMPENSATION: MEANING OF THE PHRASE "ARISING OUT OF EMPLOYMENT" AS USED IN THE CALIFORNIA LABOR CODE

By ALBERT BIANCHI

Workmen's Compensation has been concisely defined as a mechanism for providing cash benefits and medical care to victims of work-connected injuries regardless of fault, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, the premiums of which are passed on in the cost of the product.[1] In all but a few states the basic formula for compensation requires a personal injury to, or death of, an employee by accident "arising out of and in the course of employment." In California, for instance, the Labor Code, section 3600, reads in part as follows:

> Liability for the compensation provided by this division . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees *arising out of and in the course of* the employment and for the death of any employee if the injury proximately causes death . . . . (Emphasis added.)[2]

As the statute makes clear, Workmen's Compensation is not intended to amount to an insuring by the employer of his employees at all times and under all circumstances during the period of employment, but only where certain conditions are met, including one that the injury be of a type "arising out of" the employment.[3] However, the California statute does not define this phrase—the meaning intended by the Legislature has been left for determination by the courts.[4] It is the purpose of this article to review some of the judicial interpretations of the words "arising out of . . . the employment"[5] as used in the California Labor Code, and to attempt to define the view which prevails in California at the present time.

Several different theories have been utilized by the courts in awarding or denying Workmen's Compensation. One of these has been designated the "peculiar risk doctrine."[6] Under this view, an injury arises out of employment only when it results from a hazard peculiar to or increased by that employment, and not common to the public generally.

---

[1] LARSON, WORKMEN'S COMPENSATION §1.00 (1952).

[2] CALIF. LAB. CODE § 3600.

[3] CALIF. LAB. CODE § 3600; Larson v. Indus. Acc. Com., 193 Cal. 406, 224 P. 744 (1924); Storm v. Indus. Acc. Com., 191 Cal. 4, 214 P. 874 (1923); Casualty Co. v. Indus. Acc. Com., 176 Cal. 530, 169 P. 76 (1917); Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24 (1915).

[4] 27 CAL. JUR. § 6; Gen. Acc. Fire & Life Assur. Corp. v. Indus. Acc. Com., 186 Cal. 653, 200 P. 419 (1921).

[5] CALIF. LAB. CODE § 3600.

[6] LARSON, WORKMEN'S COMPENSATION § 6.00 *et seq.*

A second theory is called the "actual risk doctrine."[7] It is based on the proposition that whether the risk was also common to the general public is immaterial, so long as it was in fact a risk of the particular employment.

The third and by far the most liberal view is the "positional risk doctrine."[8] Under this theory, the injury is said to arise out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed the workman in the position where he was injured. Under this theory, compensation may be awarded in situations where the only connection between the employment and the injury is the fact that the employment placed the workman in the particular place at a particular time when he was injured. Hence compensation may be made available whenever the employment brings the workman to the position where he is injured.

We will now examine each of these doctrines as they have been applied, albeit sometimes in a modified form, by the California courts.[9]

I. The Peculiar Risk Doctrine

In *Coronado Beach Co. v. Pillsbury*,[10] decided in 1916, an employee who was known by his associates to be particularly susceptible to tickling, was tickled by a coemployee while descending stairs at the place of employment. He fell and was injured. The California Supreme Court classified the injury as one resulting from "horseplay," and held that it did not arise out of the employment. The court set out the following rule:

> "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. (Citation.) It 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."[11]

The court's attitude was that the risk in this case was not peculiar to the employment, hence the injury did not arise out of the employment and was not compensable.

In the same year, the court considered another case, *Kimbol v. Indus. Acc. Com.*,[12] in which an employer had leased the lower floor of a building,

[7] *Ibid.*

[8] *Ibid.*

[9] A fourth view, "the proximate cause" doctrine, will not be discussed here. It depended largely on tort principles, and required that the harm have been foreseeable as a hazard of the type of employment involved if it was to be compensable. See LARSON, WORKMEN'S COMPENSATION § 6.00 *et seq.*

[10] 172 Cal. 682, 158 P. 212 (1916).

[11] *Id.* at 685, 158 P. at 213.

[12] 173 Cal. 351, 160 P. 150 (1916).

using it for a restaurant. The floor above, which was rented by a stranger, gave way, thereby causing an employee below to be injured by a falling object. Applying the peculiar risk doctrine here, the court found that compensation should be awarded:

> "The danger was one peculiar to that very place . . . and it is not unreasonable to say that Douglas was specially exposed to that danger by reason of his employment."[13]

In *State Comp. Ins. Fund v. Indus. Acc. Com.*,[14] decided in 1924, a hotel maid was injured by falling while leaving the servants' entrance to the hotel on her "day off." The California Supreme Court held that she was entitled to compensation under the peculiar risk doctrine:

> "Where the employment itself involves peculiar and abnormal exposure to a common peril, which peculiar exposure is annexed as a risk incidental to the employment, it has been repeatedly held that the risk is incidental to the employment within the meaning of compensation statutes."[15]

And later in this same opinion the court went a step further than was usual under the peculiar risk theory, saying:

> "The fact that the accident happens upon a public road or at a railroad crossing, *and that the danger is one to which the general public is likewise exposed,* is not conclusive against the existence of such causal relationship if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree." (Emphasis added.)[16]

By saying that the injury was compensable even though the general public was exposed to the same risk, the court seems to have liberalized the rule previously applied in such cases. Thus the stage was set for the California courts to move on to our second theory, the actual risk doctrine.

II. The Actual Risk Doctrine

In 1927 the California courts had occasion to decide the case of *Enterprise Dairy Co. v. Indus. Acc. Com.*,[17] where a milk truck driver was injured by the glass from milk bottles which were caused to fall and break as a result of an earthquake. It might be possible to argue that because the driver's employment involved the handling of glass objects, susceptible as they are to breakage, that the driver was in fact "peculiarly exposed" to risk of injury by reason of his employment. On the other hand, the earthquake which caused the bottles to break was certainly not a risk peculiar to the employment; it seems fair to say that any member of the public would share equally in the chance of injury from an earthquake. In any

[13] *Id.* at 354, 160 P. at 151.
[14] 194 Cal. 28, 227 P. 168 (1924).
[15] *Id.* at 31, 227 P. at 168.
[16] *Id.* at 31, 227 P. at 169.
[17] 202 Cal. 247, 259 P. 1099 (1927).

event, the court permitted the milk truck driver to recover compensation. Such a result would follow logically if the doctrine of actual risk were applied, but would have been much more unlikely under a strict application of the older peculiar risk doctrine.

And in 1936, in *Calif. Cas. Ins. Exch. v. Indus. Acc. Com.*,[18] the court ordered compensation for the widow and child of a salesman who was required to travel on his employer's business, and while on such a trip spent the night in an auto camp, where he was asphyxiated by carbon monoxide gas from a heater. Quite probably any member of the general public who stayed at the particular place at the time under discussion would have been likewise asphyxiated. Hence the risk was not peculiar to the employment. But regardless of whether the risk was common to the general public, it was in fact an actual risk of the particular employment, and recovery was therefore permitted.

A somewhat analogous case, *Pac. Emp. Ins. Co. v. Indus. Acc. Com.*,[19] arose in 1942. There a traveling salesman contracted San Joaquin Valley fever while in the valley on business for his employer, it appearing that the employer's business was his sole reason for being there, and medical testimony being to the effect that the disease was of a type characteristically found in the valley and that in the doctor's opinion the disease was contracted there. Compensation was awarded, and the court stated flatly:

> "The injuries suffered to be compensable need not be . . . peculiar to the employment."[20]

With the peculiar risk doctrine so definitely dead and buried, the California courts in 1945 were ready to set out the actual risk rule in a purer form, and this was accomplished in the case of *Pacific Emp. Ins. Co. v. Indus. Acc. Com.*[21] In that case an employee, a bus girl in a hotel, was struck in the eye by a hard roll thrown by another employee who acted without animosity and in fact was trying to hit a third employee. The court directed that compensation be awarded, and expressly overruled *Coronado Beach Co. v. Pillsbury*,[22] a "horseplay" case discussed earlier in this article. The *Coronado* case, applying the peculiar risk doctrine, had denied compensation for injuries resulting from horseplay of a fellow employee. In overruling *Coronado,* the court said:

> "The essential prerequisite to compensation is that danger from which the injury results be one to which he is exposed as an employee in his particular employment."[23]

California was now ready to embrace an even more liberal view—the positional risk doctrine.

---

[18] 5 Cal.2d 185, 53 P.2d 758 (1936).
[19] 19 Cal.2d 622, 122 P.2d 570 (1942).
[20] *Id.* at 629, 122 P.2d at 573.
[21] 26 Cal.2d 286, 158 P.2d 9 (1945).
[22] 172 Cal. 682, 158 P. 212 (1916).
[23] See note 21 *supra* at 289, 158 P.2d at 11.

III. The Positional Risk Doctrine

In the case of *Indus. Indem. Co. v. Indus. Acc. Com.*,[24] decided by the California District Court of Appeal in 1950, the court apparently adopted the positional risk theory. The facts showed that an employee of an inn was killed by a shot intended for a customer during an altercation in which the employee took no part. The employee's minor child was awarded workmen's compensation, the court saying:

> "[W]hen a person's employment brings him to a position which becomes dangerous and he is there acting in the scope of his employment, his injury is compensable."[25]

Under this view, then, there is no need to show, in order to gain compensation, that the injury resulted from a risk peculiar to the employer's business, nor that there was an actual risk of injury to the employee who was acting in pursuance of his employment—the injury will be held to have arisen out of the employment whenever it can be shown that the employment required the employee to be in what turned out to be a place of danger.

In 1952 the California Supreme Court indicated its approval of this position in *State Comp. Ins. Fund v. Indus. Acc. Com.*,[26] a case wherein an employee in a road construction crew was the aggressor in a fight with his foreman, and was injured in the scuffle. Compensation was awarded. The court said:

> "It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes."[27]

Notice that in this case the workman himself, by being the aggressor, probably caused the peril to strike; nonetheless, it was by reason of his employment that he was within its range, and hence the injury was said to arise out of the employment.

Two recent cases, *Madin v. Indus. Acc. Com.*[28] and *Wiseman v. Indus. Acc. Com.*,[29] both decided in 1956, indicate that California will continue to look upon the question of whether an injury arises out of employment with a liberal and, in the opinion of this writer, a commendably humane attitude. In the *Madin* case, an employee lived in one of his employer's rental units under an agreement to act as caretaker and manager of the property. He was injured when a bulldozer, which was being used on other property not belonging to the employer, ran wild after being started without authority by some boys, and rammed into a unit occupied by the employee, push-

---

[24] 95 Cal. App.2d 804, 214 P.2d 41 (1950).
[25] *Id.* at 813, 214 P.2d at 47.
[26] 38 Cal.2d 659, 242 P.2d 311 (1952).
[27] *Id.* at 666, 242 P.2d at 315.
[28] 46 Cal.2d 90, 292 P.2d 892 (1956).
[29] 46 A.C. 576, 297 P.2d 649 (1956).

ing him while in bed through the walls of the unit. In holding that compensation should be awarded, the court stated:

> "Where the injury occurs on the employer's premises, while the employee is in the course of the employment, the injury arises out of the employment unless the connection is so remote from the employment that it is not an incident of it."[30]

To see just how far an employee may go and still not be injured by a force which is "so remote from the employment that it is not an incident of it," we need but examine the *Wiseman* case. There the employee was on a business trip, and while staying in a hotel with a woman not his wife, died from asphyxiation and burns from a fire probably caused by the careless smoking of the employee or the woman. Compensation was awarded to the employee's widow and daughter. Said the court:

> "The fact that the employee had a guest in his room while he was off duty in no way detracted from the fact that he was also there on his employer's business, and since the employee's fault is irrelevant if the requirements of the law are met, it is immaterial that the employee's personal purpose in having a guest in his room was immoral and unlawful."[31]

It might be well to conclude by making one further observation. As was stated previously in this article, the California Labor Code, section 3600, requires that if an injury is to be compensable it must both *arise out of* and occur *in the course of* employment.[32] We have seen that the California law has passed through a remarkably active evolutionary process in reaching its present concept of the phrase "arising out of employment" as used in the Workmen's Compensation statute. We will not here attempt to review the history of the additional phrase requiring that the injury also occur "in the course of employment." But we may say that insofar as "in the course of employment" is concerned, it seems from the cases that ordinarily the purpose of the conduct of the employee out of which the injury arose, rather than the method of its performance, determines whether he was injured in the course of his employment, unless the conduct, even though intended to forward the purpose of the employer, was of such an extraordinary nature that it could not reasonably be said to be within the scope of the employment.[33] And it would appear that under the present California view as expressed in the *Madin*[34] case and reiterated in the *Wiseman*[35] case, the phrase "in the course of employment" includes everything which is meant by "arising out of employment." A finding that the injury occurred in the course of employment will ordinarily also involve a

[30] See note 28 *supra* at 93, 292 P.2d at 895.

[31] See note 29 *supra* at 579, 297 P.2d at 651.

[32] CALIF. LAB. CODE § 3600.

[33] Standard Lumber Co. v. Indus. Acc. Com., 60 Cal.App. 331, 212 P. 720 (1922); 27 CAL. JUR. § 60.

[34] See note 28 *supra*.

[35] See note 29 *supra*.

conclusion that the injury was one arising out of the employment, "unless the connection is so remote from the employment that it is not an incident of it."[36] Thus while the two phrases originally had separate and distinct meanings, a "moving together" has taken place, and the two now appear to be virtually synonomous.

[36] See note 30 *supra.*