Laeng v. Workmen's Compensation Appeals Board: Recovery for a Job Tryout

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LAENG v. WORKMEN'S COMPENSATION
APPEALS BOARD: RECOVERY FOR
A JOB TRYOUT

Workmen's compensation was one of the first major social welfare programs1 proposed in the beginning of the twentieth century.2 This novel, progressive social legislation statutorily imposed strict liability on the employer for employees who suffered injuries while in the course of their employment. Proposed in the face of economic growth born of the Industrial Revolution, its inception was in an atmosphere of controversy and compromise.3 One of the most controversial issues centered on the scope of compensation coverage.4 Who was to be considered an "employee" covered by workmen's compensation insurance?

The legal significance of the concept of employee in early common law was chiefly to ascertain the scope of an employer-master's vicarious tort liability for the acts of his employee-servant. Early interpretations of workmen's compensation coverage were restricted when the courts superimposed this narrow common law concept upon legislative intent.5 Such an application of the master-servant concept to limit the compensation coverage of an employee misstated the social insurance nature of workmen's compensation that separated it from

3. See Nat'l Comm'n Report, supra note 2 at 33-33; Grillo, supra note 1, at 251.
tort, and as a result, the scope of employee coverage was limited unnecessarily.

An additional factor restricting the scope of employee coverage was the economic rationale that had been used to gain passage of this novel social legislation—the "enterprise theory" of liability. Theoretically, the cost of the individual worker's injury was to be shouldered by the responsible industry, with the cost being shifted ultimately to the consumer through an increase in the price of the industry's product. When viewed as the basis for workmen's compensation coverage, the enterprise theory excluded workers providing services in any way atypical. The result was varying state exclusions of these atypical employees, such as those employed by charitable and nonprofit institutions, domestic employees, independent contractors, volunteer workers, and workers trying out for a job. While the enterprise theory may have been necessary as a justification for the initial passage of what was, at the time, extremely liberal social legislation, the focus of modern concern should no longer be predominantly upon how the employer will amortize his losses, but rather upon the injured and disease employees relegated to the "human scrap heap created by the American industrial juggernaut."
Recent criticism of workmen's compensation is that it is fast becoming "creakingly obsolete." Harsh language often is directed at the law's omission from coverage of many of the atypical workers that most states erratically exclude. This current atmosphere of concern for expansion of the scope of coverage is reflected by recent governmental attempts at self-evaluation and reform at the state level. The courts also are actively participating in efforts at liberalizing the extent of coverage, and more atypical working situations have been included. The California Supreme Court recently added momentum to this liberalizing effort in Laeng v. Workmen's Compensation Appeals Board, when it held that an applicant for a job who was injured while performing an agility test was an employee within the coverage of workmen's compensation. The court held that the applicant was an employee because he was rendering a service and benefit to the prospective employer and was under the employer's direction and control. This decision flies in the face of the statutory definition of employee, which previously called for a "contract of hire" and the long standing judicial test that such a "contract" commenced only upon acceptance for the job sought. This note will analyze the previous California demic in St. Clair, Workmen's Compensation, 8 Trial 34 (May-June 1972) [hereinafter cited as Nader Report].


18. See Nat'l Comm'n Report, supra note 2, at 43-52; Brodie, supra note 17, at 74-77; Horovitz, A Veteran's View, 8 Trial 35 (May-June 1972); Page & O'Brien, supra note 16.


The federal government has also recognized the need to reevaluate present workmen's compensation coverage. In 1971, the President appointed a national commission to evaluate the systems of compensation in the United States. The yearlong study concludes that the first of four basic objectives of reform be "broad coverage of employees and work-related injuries and diseases." The commission continues: "We recommend that the term 'employee' be defined as broadly as possible. Doubts as to whether a worker is an employee or a non-employee . . . should be resolved as to favor workmen's compensation coverage." Nat'l Comm'n Report, supra note 2, at 48.


22. Id. at 780-83, 494 P.2d at 7-9, 100 Cal. Rptr. at 383-85.


law on tryout injuries, the recent trend in other jurisdictions, and discuss the Laeng decision and its impact on the breadth of workmen's compensation coverage for an employee.

Laeng v. Workmen's Compensation Appeals Board

The California workmen's compensation laws contain a mandate that the statutes applicable to coverage be liberally construed in favor of inclusion of injured parties as benefit recipients. Considering this statutory directive, the California Supreme Court in Laeng liberalized the statutory requirement of a contract for hire as a prerequisite to the commencement of an employment relationship. In so doing, the court clarified who may qualify as an employee within the purview and protection of California's workmen's compensation laws.

Laeng's claim was against the city of Covina, which was conducting physical agility tests as part of a tryout to screen applicants for "refuse crew worker." The tests—situps, chinups, broad jump, and obstacle course—were competitively scored; the type of exertion required was to simulate working conditions. The obstacle course was timed to induce speed, and while hurrying along an elevated, horizontal telephone pole, Laeng fell and seriously injured his foot. The workmen's compensation referee overcame sympathy for the "equities" of Laeng's claim and denied compensation coverage. The Workmen's Compensation Appeals Board (WCAB) concluded that such an injury during a tryout for a position was not compensable because Laeng was not an employee of the city, and affirmed the referee's decision.

The California Supreme Court, however, had a different concept of employee for purposes of the workmen's compensation laws. Justice Tobriner, breaking new ground for the state supreme court, reversed and sustained Laeng's claim, adjudging him an employee within the definition of the California Labor Code. Section 3351 of that code defines employee, for purposes of workmen's compensation, as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . " Section 3357 states that "[a]ny person rendering service for another, other than as an independent contractor, or unless ex-

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25. CAL. LABOR CODE § 3202 (West 1971).
29. The sole dissent was by Justice McComb. 6 Cal. 3d 771, 783, 494 P.2d 1, 9, 100 Cal. Rptr. 377, 385 (1972).
30. CAL. LABOR CODE § 3351 (West 1971).
pressly excluded herein, is presumed to be an employee. 31 Within this statutory context, Justice Tobriner added a concise recital of pertinent California compensation cases, inducing an inference that Laeng is an unquestionable outgrowth of previous decisions, both administrative and judicial. However, this understated the confusion surrounding the law prior to Laeng.

**Contract of Hire—A Test of an Employment Relationship**

The nucleus of the previous confusion can be traced to the early application of tort doctrines to the workmen's compensation system— that is, the common law notion of a contract of hire as a prerequisite in creating an employment relationship. 32 Clearly Laeng recovered as an employee without any contract of hire. Moreover, the court expressly refused to be constrained by the technical contractual concept: Although we recognize that at the time of his injury the claimant was not yet “employed” by the city in any contractual sense, we are not confined, in determining whether Laeng may be considered an “employee” for the purposes of workmen's compensation, to finding whether or not the city and Laeng had entered into a traditional contract of hire. 33

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32. For a comprehensive explanation of why the common law, tort-oriented definition of servant should never have been superimposed upon the workmen's compensation concept of employee, and the confusion engendered as a result see 1 Larson, *supra* note 6, §§ 1.20-2.

The following excerpt from Campbell's 1935 treatise on California workmen's compensation law illustrates the pervasiveness of this confusion: “There is no distinction between the terms 'servant' and 'employee.' While the [workmen's compensation] Act furnishes its own definition of master and servant, the common-law definition remains essentially unchanged.” 1 Campbell, *supra* note 5, at 387.
33. See Riesenfeld & Maxwell, *supra* note 5.
34. 6 Cal. 3d at 776, 494 P.2d at 4, 100 Cal. Rptr. at 380 (emphasis added). The court relied on the explicit use of disjunctives in the Labor Code definition of employee as support for its rejection of the contention that a contract of hire is itself a prerequisite for recovery. *Id.* at 777, 494 P.2d at 4, 100 Cal. Rptr. at 380. The code defines an employee as “Every person in the service of an employer under any appointment or contract of hire or apprenticeship . . . .” **Cal. Labor Code** § 3351 (West 1971). However, Laeng does not qualify as an “appointee” nor as an “apprentice.”

Clearly there is no apprenticeship agreement. Similarly, the provision in the statutory definition for creating an employment relationship by appointment is inapplicable. An appointment's significance is largely relegated to claims involving injured appointees to public positions and the relationship created thereby usually has the characteristic traits of a contract of hire, such as consent of the parties. Additionally, it is still questionable whether such an appointed public officer qualifies as an employee for compensation purposes unless he is receiving remuneration on some basis. See *generally* 2 Hanna, *California Law of Employee Injuries and Workmen's Compensation* §§ 3.01-.03 (2d ed. 1972) [hereinafter cited as 2 Hanna]. Thus, the court in
In fact, never has a California court been less “confined” in prior decisions relating to this area of workmen’s compensation.\(^{35}\)

As recently as 1968, Hanna had seemingly restated the present position of California law on tryout situations in his treatise on California workmen’s compensation: “Persons who are trying out for a job are not employees of the prospective employer unless they are being paid for the try-out time . . . . Until the applicant is accepted by an authorized agent of the employer, the relation of employer and employee is not established.”\(^{36}\) The limits of coverage were dependent on a judicially imposed test of an employment relationship which is based upon acceptance of the claimant for the job by an authorized agent.\(^{37}\) Under this test, the atypical situation of an injury during a tryout was excluded, except when the claimant received remunerative consideration for the tryout.\(^{38}\) In order to satisfy this contract element, a prospective employee had to be formally accepted for the position or receive pay for the tryout itself. The only inroad, then, to allowing recovery for a tryout injury before contractual acceptance of

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\(^{35}\) See notes 36-38, 47-72 & accompanying text infra.

The requirement of a contract for hire is ubiquitous in most state workmen’s compensation definitions or interpretations of employment. See BLAIR, REFERENCE GUIDE TO WORKMEN’S COMPENSATION § 5.01 (1972) [citing 26 exemplary jurisdictions, including the California case, Zurich Gen. Accident & Liab. Assurance Co. v. Industrial Accident Comm’n, 132 Cal. App. 101, 22 P.2d 572 (1933)].

Blair concludes: “A valid and enforceable contract [of hire] is the basis of an employer-employee relationship, and the general rules of contract are applicable thereto.” Id. at 5-3 n.8.

In California, Campbell’s treatise on workmen’s compensation states in no uncertain terms that to qualify as an employee, “[a] contract of employment, express or implied, is . . . an essential element in creating the [necessary] relationship.” I CAMPBELL, supra note 5, at 393.

It is interesting to note that in this area, Campbell also limits the mandate of liberal interpretation of Labor Code section 3202, upon which the Laeng opinion relied. “While the Act is remedial in its objectives. and should receive a liberal construction in favor of those entitled to its benefits, before one is permitted to claim such benefits so liberally interpreted, he should be held to strict proof that he is in a class embraced within the provisions of the statute, and nothing can be presumed or inferred in this respect. . . . This much of his showing is jurisidictional and must be established by competent legal proof.” I CAMPBELL, supra note 5, at 397 (emphasis added).


38. E.g., Gitterman v. Twentieth Century Fox Film Corp., 5 Cal. Comp. Cases 181 (1940).
the job was if the pre-employment test formed a transactional relationship on its own, that is, a pre-employment contract of sorts.

California Law Prior to Laeng

Also contrary to the inference in Justice Tobriner's opinion that *Laeng* reflects well-settled principles of California law are the obvious discrepancies between *Laeng* and prior California cases. It is, therefore, important to trace these earlier judicial and administrative decisions. The earliest relevant compensation case is *Hippensteel v. County of Fresno*,\(^39\) decided in 1917. The claimant was offered a tryout for a job as porter on the condition that if he could perform the requisite tasks, he would be hired and paid. Injured shortly after beginning the tryout, he was awarded compensation without any mention of whether a contract of hire had been found or implied. The Industrial Accident Commission simply reasoned that although the claimant "was only being tested to see whether he could perform the duties of the position, nevertheless he was an employee while thus tentatively engaged."\(^40\)

Decided only six years after the compensation laws became effective, *Hippensteel* sacrificed clear explanation of the commission's analysis for brevity. There is no mention of the contract of hire obstacle in the commission's conclusions. It seems plausible that in the spirit of reform pervasive in the first decade of this social legislation,\(^41\) the commission chose to follow the equities\(^42\) of the Hippensteel claim rather than be constrained by technicalities. Subsequent decisions for the next half a century, however, indicate that *Hippensteel* was something of a liberal anomaly.\(^43\) Subsequent to *Hippensteel*, the contract requirement became the point of commencement for compensation coverage and gradually narrowed the scope of coverage. The contractual element of acceptance for the position began to be recognized as a prerequisite for finding a claimant within the orbit of an employer-employee relationship. The necessity of this element of acceptance was

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39. 4 I.A.C. 304 (1917).
40. *Id.*
42. The fundamental purpose of all workmen's compensation laws is to protect any individual from special risks in an employment context, and to provide for the injured individual by placing the financial burden indirectly upon the employer who receives service and benefit from the individual and is presumably more capable of shouldering it. *See* 2 *Hanna*, supra note 34, at § 1.05(1)-(2). *See generally* 1 *Larson*, supra note 6, at § 2.20.
demonstrated in *Beatty v. San Diego Electric Railway Co.*,\(^4\) where a student motorman was injured while learning his routes, and again in *Gwartney v. Western Aviation Co.*,\(^5\) where a pilot was injured while familiarizing himself with a plane before carrying passengers. The commission held that both claimants, though working at their jobs without pay, were within the orbit of compensation coverage. In both cases, however, the commission noted that the claimants had offered to work and had been tentatively accepted for the jobs with which they were acquainting themselves, thus supplying the necessary contractual element.\(^6\)

This element of acceptance by the employer became a judicially formalized requirement when an appellate court in *California Highway Commission v. Industrial Accident Commission*\(^7\) overturned an award to a job applicant injured in a car collision. The claimant was en-route to a job site appointment with a foreman for final approval and commencement of work. The claimant had been sent by the Highway Commission's superintendent with the vehicle and driver provided by the commission. Nonetheless, without the foreman's final acceptance, the claimant was held not to be an employee and was excluded from coverage.\(^8\)

*Highway Commission* was cited with approval fourteen years later in another appellate decision, *Sumner v. Edmunds*.\(^9\) An aspiring newspaper boy was injured while riding in an automobile driven by an employee of the newspaper publisher. The boy was being shown a paper route prior to possible acceptance for a delivery job when the collision and injury occurred. Given these facts, the employee concept was argued from a different perspective. Contrary to the customary situation where the injured claimant seeks to establish an employee status for compensation qualification, in *Sumner* it was the defendant publishing corporation that sought to establish the boy was an employee, thereby disqualifying him from relief under the California guest statute.\(^10\) In keeping with the equities of the case, the court held that...
the boy was not an employee and expressly indicated that he failed to meet the requisite standards. “A mere offer of services not yet accepted by the prospective employer is not sufficient to make the offeree an employee.” This language set the tone of the law at that time, clearly marking the point at which an employment relationship arises to be simultaneous with the commencement of such a contract for hire.

The Gitterman-Seale Exception

The contractual principles espoused in Sumner were generally adhered to in subsequent commission cases until the decision in Gitterman v. Twentieth Century Fox Film Corp. Gitterman represented a significant modification of earlier cases requiring formal acceptance of a job applicant before the employee status arose. The claimant was a motion picture extra who was injured while being fitted for an audition costume, prior to acceptance for any part. The commission considered the claimant an employee, asserting that even if she had not been accepted for the part, she was to have received financial reimbursement for her tryout time. On similar facts, a dancer injured during audition was granted compensation in Seale v. Columbia Pictures Corp. This claimant was also being reimbursed for the audition itself, and the commission found, as a basis for its award, that “the demonstration was given for the company's benefit, and was paid for by the company...” These two cases clearly contribute to Hanna's evaluation that “[p]ersons who are trying out for a job are not employees of the prospective employer unless they are being paid for the try-out time...” His emphasis was only placed on a part of the Seale ra-

common law action, rather than when asserted by an injured individual seeking compensation. In Larson, supra note 6, at § 47.42(a).

51. 130 Cal. App. at 778, 21 P.2d at 163.

52. Directly contradictory to the conclusions in Laeng, Sumner was expressly overruled in the Laeng opinion. 6 Cal. 3d 771, 779 n.8, 494 P.2d 1, 7, n.8, 100 Cal. Rptr. 377, 382 n.8 (1972).

53. See Bennewitz v. Buchanan Olds, Inc., 8 Cal. Comp. Cases 190 (1943) (claimant was injured while being shown the workshop premises, before beginning actual labor, but after being accepted for the job by the Buchanan manager. The commission found the claimant an employee, entitled to compensation.). See also Union Lumber Co. v. Industrial Accident Comm'n, 12 Cal. App. 2d 588, 55 P.2d 911 (1936) (an injured butcher's apprentice was awarded compensation. Although the claimant received no direct monetary compensation for his work, the court found that his instructions in the butcher's trade as consideration to establish a contract of employment, thereby qualifying the claimant for compensatory benefits.).

54. 5 Cal. Comp. Cases 181 (1940).

55. 6 Cal. Comp. Cases 306 (1941).

56. Id.

57. 2 Hanna, supra note 34, at 8.
tionale: that the claimant was a paid applicant. Gitterman and Seale thus modified the strict contractual rule to the extent that claimants receiving remuneration from prospective employers could be employees within workmen's compensation.

The Effects of Sumner

Still adhering to Sumner's narrow contractual interpretation of employee, a series of harsh decisions were reached. In 1945, in Simpson v. Industrial Accident Commission, a thirty year old temporary deputy sheriff, Simpson, took a physical fitness examination on his day off work in an attempt to qualify for permanent deputy sheriff. Simpson died four days later of coronary thrombosis. The commission held the injury noncompensable and not arising out of and occurring in the course of his employment as temporary deputy, despite the fact that his job required him to be on twenty-four hour call. Moreover, temporary deputies were encouraged to take the test, presumably to give the county's permanent staff the service and benefits of pretrained and already proven personnel. Nevertheless, Simpson had not yet been accepted for the position sought and, without such contract of hire, was denied compensatory coverage.

In 1950, in Housman v. Industrial Accident Commission, a young dancer injured her leg during an uncompensated audition. The leg injury developed a tumor and, within two years, resulted in the young girl's death. The commission's opinion expressly disregarded the transportation reimbursement the girl was to receive for auditioning, dismissing this as being no payment for any services rendered. Furthermore, more explicitly than in Simpson, the commission viewed the tryout as "solely an offer of her services to a prospective employer." Since the requisite acceptance and contractual knot were absent, the injury was held noncompensable.

The Liberal Trend

Simpson and Housman were the narrowest interpretations of the employee concept. Perhaps the commission was reluctant to burden employers with claims as serious as these wrongful deaths on such ten-

58. The Laeng case, however, will shift the emphasis to the fact that the claimant was providing a service "given for the company's benefit." See notes 74-79 & accompanying text infra.
60. One issue in Simpson was the lack of evidence showing a causal relation between the fitness test and ensuing death from heart disease. This may account for what, on the surface, seems an unduly harsh decision against the claimant. Obviously, causation was not an issue in the facts of Laeng.
62. Id.
uous causation absent any clear contract of hire. In any event, over a decade later, this restrictive trend was redirected by judicial intervention.

As concern for the individual worker and the review of the provisions of social insurance increased, the courts began taking more latitude with the extent of coverage. One particularly flexible portion of the statutory language was the provision allowing an employment relationship to arise from an implied contract of hire. Imaginatively utilized, the technical constraint of a contract of hire could be satisfied without sacrificing the equities of the claim.

With the groundwork for Laeng now taking shape, an appellate court decided Department of Water & Power v. Workmen's Compensation Appeals Board. The claimant was already a city employee, injured while trying out for a new city position on his day off from work. Without pay and without direction or advice from his superiors, he took a physical agility test with all other applicants and received compensation from the board for his resulting injury. Affirming the award, an appellate court acknowledged the board's view of a tryout as performance of special tasks pertinent to the job sought to be “for the joint benefit of the employer and the employee.” The court expressly left open the question of whether an applicant not already a city employee could have recovered on the same basic facts.

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63. See notes 15-20 & accompanying text supra.

64. In 1960, a football player on scholarship was killed while traveling with his school athletic team. The appellate court overturned the commission's denial of compensation, implying a contract of hire and explicitly emphasizing the Labor Code's mandate for a liberal construction in favor of inclusion of the injured party. Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963). In a similar case a prisoner loaned to the city for labor, reimbursed with cigarettes and credit toward his sentence, was injured. Again the appellate court reversed the board's refusal of compensation, finding another contract of hire and stressing the need for liberal statutory interpretation. Pruitt v. Workmen's Comp. Appeals Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (1968).

65. 252 Cal. App. 2d 744, 60 Cal. Rptr. 829 (1967).

66. Id. at 745, 60 Cal. Rptr. at 830. The court elaborated on factors aiding its conclusion that benefits were incurred by the employer: “In the instant case the employee was injured on premises controlled by the employer while he was engaged, not in recreational activity, but in an activity directed and controlled by the employer in the furtherance of the employer's business. It is a reasonable inference that the employer's interest was being furthered by the employee's attendance and participation in the activity.” Id. at 747, 60 Cal. Rptr. at 831.

This element of direction and control by the prospective employer is also an express factor in the subsequent Laeng decision. See notes 95-96 & accompanying text infra.

67. Id. at 748, 60 Cal. Rptr. at 831. Justice Tobriner pointed out in the Laeng opinion that this, in effect, is the question determined in Laeng. 6 Cal. 3d 771, at 681 n.9, 494 P.2d 1 at 8 n.9, 100 Cal. Rptr. 377 at 383 n.9.
Judicial emphasis continued to shift away from the constraining common law contractual notions and any requirement of remuneration. Rather the courts focused on whether the applicant was providing a service for the employer.68 Likewise, the parameters of the employee concept continued to become increasingly malleable.69 For example, the Workmen's Compensation Appeals Board granted compensation to a student nurse injured while receiving hospital training.70 The board, straining to find an implied contract of hire,71 made apparent its willingness to apply the Labor Code mandate favoring liberal construction, but still more apparent was the confusion over whether the contract requirement remained essential. The board stated, “It appears manifest under statutory and case law that a contractual relationship must exist between the parties before a claimant is entitled to benefits.”72

The Laeng Approach

This was the muddled state of the law which the California Supreme Court faced in Laeng. The employer contended that no contract of hire existed when the injury occurred and that the elements of consideration were missing since Laeng was receiving no remuneration for taking the test.73 Furthermore, it was contended that Laeng was not performing services which would allow compensation. Unfettering itself from the overly confining view that employment is created solely by a contractual relationship,74 the court focused on the respondent's second contention and scrutinized the “substance and essence”75 of the relationship in this tryout situation. The court was not detoured by whether the prospective employer paid the applicant for the tryout.76

69. In Pruitt v. Workmen's Compensation Appeals Board, the court instructed: “When the board is determining the status of a petitioner as an 'employee,' it must look to the substance and essence of the relationship between the petitioner and the party sought to be charged as the employer.” 261 Cal. App. 2d 546, 552, 68 Cal. Rptr. 12, 16 (1968) (emphasis added).
71. See note 64 & accompanying text supra.
72. 35 Cal. Comp. Cases at 35.
73. 6 Cal. 3d at 777 n.5, 494 P.2d at 4 n.5, 100 Cal. Rptr. at 380 n.5. The fact that Laeng was receiving no pay for taking the test eliminates any implication of a contract of hire. See note 67 & accompanying text supra. Also eliminated is any invocation of the Gitterman-Seale exception. See notes 54-57 & accompanying text supra.
74. See note 34 & accompanying text supra.
75. See note 69 & accompanying text supra.
76. See note 73 supra.
As a competitor for a job, Laeng clearly was not volunteering his services. The significant consideration was what the applicant provided for the prospective employer—benefits and service in a hazardous employment context under the direction and control of the employer. Thus, the court placed great weight on section 3357 of the Labor Code, emphasizing its requirement that, "Any person rendering service for another . . . is presumed to be an employee."  

**Other Jurisdictions**

Whether there is a sufficient service or benefit rendered in such a tryout situation to justify workmen’s compensation coverage of the applicant as an employee has been considered recently in other jurisdictions. The novelty of the facts, coupled with the lack of California precedents directly in point, induced the court's serious consideration of the decisions in other jurisdictions on this issue. The Laeng court placed considerable reliance on two New York decisions, *Smith v. Venezian Lamp Co.* and *Bode v. O. & W. Restaurant.* Smith, a prospective lamp polisher, and Bode, a prospective pantry chef, were injured while trying out for these positions and sought compensation. The technical obstacle of finding or circumventing any requisite contract of hire did not restrain the New York courts. The New York Workmen’s Compensation Law defines employee in pertinent part as “[a] person engaged in . . . the service of an employer whose principal business is that of carrying on or conducting a hazardous employment . . . .” As such, the crux of these New York decisions was the statement in *Venezian* that, “A tryout is for the benefit of the employer as well as the applicant, and if it involves a hazardous job we see no valid reason why the applicant should not be entitled to the protection of the statute.”

A Texas court has also suggested that its workmen’s compensation coverage is applicable to pre-employment activities, engaged in “not
for the benefit of the applicant, but wholly for the benefit of the employer and under its direction and control." This unusually strong statement forsakes any requirement of bilaterality inherent in any contract of hire, and focuses solely upon the unilateral consideration moving from the worker-claimant. The California Supreme Court appears to have utilized this same unilateral theory in Laeng.

Conclusion

The novelty of the tryout injury has not produced sufficient recent litigation to strongly indicate a national trend on the specific issue. However, the holdings of Venezian and Laeng are unchallenged.


This was a personal injury action in which the plaintiff alleged negligence on the part of the defendant company for failure to inform the plaintiff of an active tuberculin condition, allegedly revealed by chest x-rays taken as part of plaintiff's examination prior to beginning work. Summary judgment for the defendant was affirmed on the ground that the plaintiff was an employee and therefore her remedy was confined to workmen's compensation. She had no basis for relief under workmen's compensation since she had alleged an occupational disease, which is consistently non-compensable under Texas Workmen's Compensation law.

The decision appears to have been reached in spite of the equities of the case and contrary to the general policy of requiring more conclusive proof of an employment relationship when the relationship is used as an employer's defense to a common law action rather than to qualify an injured party for workmen's compensation. See note 50 & accompanying text supra.


86. Lotspeich lends support to Laeng in another vein. The California Workmen's Compensation Appeals Board distinguished Laeng from Venezian and Bode because the tryouts in the New York cases had the applicants performing the tasks of the actual positions sought. 6 Cal. 3d at 780, 494 P.2d at 7, 100 Cal. Rptr. at 383. Thus the service and benefits to the employer were more tangible than a mere agility test.

This distinction seems to confine service and benefits to the formula of the enterprise theory. See notes 7-15 & accompanying text supra. Even though the claimants in Venezian and Bode were only trying out for their positions, they were performing a constructive part of the work operation, designed to prepare a product for consumer purchase. Whereas, in the more atypical Laeng and Lotspeich cases, there are no immediate financial benefits to the employer from the employee's physical examination prior to beginning work.

The Laeng opinion that to distinguish whether the applicant was trying out on-the-job is to over-emphasize the significance of the format of the tryout. Id. at 781, 494 P.2d at 7, 100 Cal. Rptr. at 383. Similarly, the Lotspeich opinion did not allow the format of the examination to preclude a finding of benefit to the employer originating therein. "In the case before us, the physical examination was conducted . . . wholly for the benefit of the employer." 369 S.W.2d at 709 (emphasis added).

87. Varying state statutory definitions of an employee compound the lack of uniformity on decisions. Larson's treatise, for example, can only inconclusively
by any recent judicial decisions. Beyond their obvious effect in their respective jurisdictions of extending compensation coverage to individuals injured in the tryout context, the courts' underlying theme has a broader impact. They have sidestepped technical obstacles and narrow interpretations of statutory language advanced in earlier decisions to reach the fundamental purposes of workmen's compensation law—protecting the working man from any special risks present in an employment context.

In California, as in numerous other states, coverage had been limited by insistence on a contract of hire as the means of creating an employment relationship. The Laeng court chose to relegate this unnecessarily rigid constraint to its proper perspective of being a useful guideline which should not obfuscate the equities of the injured workman's claim. Moreover, Laeng indicates that the contract of hire test is not categorically superimposed upon the workmen's compensation concept of employee.

We believe that an "employment" relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act.

Dissecting the employee concept for compensation qualification, the Laeng opinion acknowledges the factor of control exercised by the employer over the workman when injury occurs and the special risk imposed since the workman is under the employer's direction. The key element, though, seems to be that the workman render service and benefit to the prospective employer. Even without a formal contractual offer and acceptance of a job per se, this flow of consideration to the employer may be sufficient to invoke the employer's responsibility for an individual injured while providing such service and benefit. Assuming that the injured individual has satisfied this service and benefit

summarize, "some close cases arise when injury occurs during a tryout period." 1a

Larson, supra note 6, at 779.

88. See notes 47-60 & accompanying text supra.
89. See note 42 supra.
90. See notes 47-60 & accompanying text supra.
92. 6 Cal. 3d at 777-78 n.7, 494 P.2d at 4-5 n.7, 100 Cal. Rptr. at 380-81 n.7.
93. The referee initially hearing the Laeng claim observed that, "[a]lthough the equities appear to be in favor of applicant, [the] law appears to preclude a finding of employment..." Id. at 776, 494 P.2d at 4, 100 Cal. Rptr. at 379 (emphasis added).
94. Id. at 777, 494 P.2d at 4-5, 100 Cal. Rptr. at 380-81.
95. Id. at 783, 494 P.2d at 9, 100 Cal. Rptr. at 385.
96. Id.
97. Id. at 780-83, 494 P.2d at 7-9, 100 Cal. Rptr. at 383-85.
test, the court has equated the commencement of the employment relationship with when the risks of the employment relationship begin to operate. Whether criticized as judicial legislation or praised as reasonably stretching the statutory language to suit the equities and purposes of the legislation, this is presently the law in California.

Viewing the impact of Laeng in its broadest spectrum, the decision seems entirely consonant with the recently renewed concern for the adequacy and equity of compensation for workmen. The laws were engendered in an atmosphere of concern for the individual employees who had become the cogs and victims of the Industrial Revolution's relentless economic advance. But shortsighted statutory drafting coupled with narrow interpretations of the law did not provide the means for an equitable result in all cases. The scope of compensation coverage, particularly its erratic, categorical exclusions of certain atypical workers, is now under considerable fire. The legislatures are not altogether deaf, and Laeng clearly indicates that neither are the courts.

Randall Wulff*

98. Id. at 782-83, 494 P.2d at 8, 100 Cal. Rptr. at 384.
99. See notes 15-20 & accompanying text supra. See generally 2 Hanna, supra note 34, § 8.02.
100. See note 19 & accompanying text supra.
101. See notes 47-60 & accompanying text supra.
102. See notes 15-20 & accompanying text supra.

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