

## THE MISSOURI WORKMEN'S COMPENSATION ACT

BY MAURICE L. STEWART

The writer of this article does not intend to prophecy as to the constructions which the Missouri Courts will place on the various provisions of this new act and the problems arising under its provisions, but on the contrary, acting upon the presumption that a majority of the readers are unfamiliar with its provisions, he will survey briefly the various provisions of the act as a whole, and then point out the constructions placed by other courts on two provisions—namely, the clauses “personal injury or death by accident” and “arising out of and in the course of the employment,” provisions which are not only in the Missouri Act, but are to be found also in the acts of a majority of the other states having a Workmen's Compensation Law.

### THE GENERAL SCOPE OF THE ACT

The Missouri Act was promulgated by the Fifty-third General Assembly in 1925,<sup>1</sup> but because of the filing of referendum petitions with the required number of signatures, the Act did not go into effect at that time and was submitted to the people at the election in November, 1926. The Act was approved, and in the opinion of North T. Gentry, Attorney-General, it became a law November 16, 1926, and that after that date it was proper for the governor to appoint the members of the commission, although because of the provision contained in section 79, the Act did not go into operation on employers until fifty-four days after November 16.<sup>2</sup>

The Act is one which may be classed as elective and is not compulsory. Neither the employer nor the employee is compelled to accept its provisions, but both are conclusively presumed to have accepted the Act unless prior to the accident written notice of election to reject the Act is filed with the Workmen's Compensation Commission.<sup>3</sup>

The constitutionality of elective acts has been attacked on many grounds—that they deprive the injured and his dependents of the right of trial by jury, that they confer judicial powers on administrative bodies, that they violate the Fourteenth Amendment, and that they deprive employers of common-law defenses—but they have been upheld

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<sup>1</sup> Laws of Mo. 1925, pp. 375-407.

<sup>2</sup> See XII SAINT LOUIS LAW REVIEW 55 for opinion in full.

<sup>3</sup> Sec. 2.

repeatedly by both State and Federal Courts.<sup>4</sup> The United States Supreme Court, in *New York Central Ry. v. White*,<sup>5</sup> said, "The common law bases the employer's liability for injuries to the employee on the ground of negligence; but negligence is merely a disregard for some duty imposed by law; and the nature and extent of the duty may be modified by legislation with corresponding changes in the test of negligence." Continuing in reference to the abolition of the employer's common law defenses, the court said, "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit," and referring to the abolition of the defense of "fellow service" the court said, "It needs no argument to show that such a rule is subject to modification or abrogation by a State upon proper occasion. The same may be said with respect to the general doctrine of assumption of risk, . . . so, also with respect to contributory negligence." In this connection it is also to be noted that in most instances even acts having compulsory provisions have been sustained.<sup>6</sup>

The Act provides, section 3, that if both the employer and employee elect to accept the provisions of the Act, the employer shall be liable "irrespective of negligence," to furnish compensation for the personal injury or the death of the employee by "accident arising out of or in the scope of his employment," and shall be released from all other liability therefor, whether to the employee or to other persons. That, "the rights and remedies herein granted to an employee shall exclude all other rights and remedies of such employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by the Act." If the injury is such that a third person may also be liable to the employee or his dependents, the employer is subrogated to such right of action of the employee or his dependents against the third person. Any recovery of such employer in excess of the compensation and expenses of such recovery is to be paid to the employee or his dependents, and shall be treated as an advance on future installments of compensation.

The provisions of the Act, except as to cases exclusively covered by the federal law, apply to all injuries received in the state, and all injuries received out of the state under a contract of employment made in the state, unless the contract of employment otherwise provides.<sup>7</sup>

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<sup>4</sup> *Hawkins v. Bleakley*, 243 U. S. 210, 61 L. Ed. 678; *N. Y. C. Ry. v. White*, 243 U. S. 188, 61 L. Ed. 667; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343; *Deibeikes v. Link Belt Co.*, 261 Ill. 454; *Opinion of Justices*, 209 Mass. 607.

<sup>5</sup> 243 U. S. 188, 61 L. Ed. 667.

<sup>6</sup> *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. Ed. 685.

<sup>7</sup> Sec. 12.

Employers are divided into two classes—major and minor. The major employer is one who has more than ten men regularly employed.<sup>8</sup> Every major and every minor employer whose occupation has been deemed hazardous to employees are conclusively presumed to have accepted the provisions of the Act unless they have filed notice of their election to reject the act with the Commission in accordance with sections 1 and 4 (c), respectively.

If employers who fall within the provisions of the act file notices of rejecting the act, they forfeit the defenses of "negligence of a fellow-servant," and "that the employee has assumed the risk of his employment," in any action for damages for personal injury or death of employee in course of the employment brought against them. However, an employer who accepts the provisions of the act does not forfeit the above defenses, and may assert them in an action brought against him by an employee who has rejected the act.<sup>9</sup>

Certain classes of employments are not within the scope of the act.<sup>10</sup> Among them are employments by the state, and by governmental subdivisions thereof, farm and domestic servants, casual employees, employments in nature of home manufacture, and minor employments where the occupation has not been determined by the Commission to be hazardous. Provision is also made under Section 4 (e) whereby any employer who has accepted the act may exempt himself from the provision of the act as to any individual employee whose occupation is non-hazardous. However, any of the exempt employers may bring themselves within the provisions of the act by filing notice of their election to accept the act with the Commission, and posting notices of their acceptance in accordance with provision of section 5, subdivision 5.

In this connection, it is of interest to note that the term "employee" as used in the act does not include persons whose average yearly wage exceeds thirty-six hundred dollars, and that, for the purposes of the act, minors are made of full age.<sup>11</sup> The Missouri courts have declared it competent for the legislature to declare a minor of full age for purposes of making contracts, and this decision would seem to establish by analogy the legality of the provision in the compensation Act as to minors.<sup>12</sup>

#### PENALTIES WHICH AFFECT THE AMOUNT OF THE COMPENSATION

No compensation may be received if the injury is due to the employee's "intentional self-inflicted injury," but the burden of proof of

<sup>8</sup> Sec. 4.

<sup>10</sup> Sec. 5.

<sup>12</sup> *Dickens v. Carr*, 84 Mo. 658.

<sup>9</sup> Sec. 4 (d).

<sup>11</sup> Sec. 7 (a).

<sup>12</sup> Sec. 3.

self-infliction is upon the person contesting the claim to compensation.<sup>13</sup> What amounts to an "intentional self-inflicted injury" is an uncertain problem. Suicide is such a self-inflicted injury and not compensable unless it is the consequence of a mental derangement resulting from accident in the course of the employment. However, mere contributory negligence has been held not a bar to compensation.<sup>14</sup>

If the injury is caused by the failure of the employer to comply with a provision of the statute or lawful order of the Commission the compensation is to be increased fifteen per cent,<sup>15</sup> and if the employer employs a minor in violation of law, the compensation is to be increased fifty per cent.<sup>16</sup> However, when the injury is caused by the "willful" failure of the employee to use safety devices provided, or failure to obey any reasonable rule adopted by the employer for the safety of the employees, when such rule has been posted, and the employer has made a diligent effort to cause his employees to use such safety devices, the compensation is to be reduced fifteen per cent.<sup>17</sup>

It is also to be noted that the Act provides that no compensation is payable for death or disability in so far as it may be caused or aggravated by the unreasonable refusal of the employee to submit to operation, where the risk is inconsiderable in view of the seriousness of the injury.<sup>18</sup>

#### COMPENSATION

The provisions for compensation and death benefit, and to whom such benefit is payable are too long and detailed to justify space here, and in addition, they are for the most part self-explanatory.

In general, the act provides, that the employer shall furnish medical treatment not exceeding two hundred and fifty dollars in amount for the first six months and for such additional treatment thereafter as the commission may determine necessary in case of death, funeral expenses of deceased not to exceed one hundred fifty dollars in amount and reasonable expense of last sickness not to exceed two hundred and fifty dollars, and pay the compensation or death benefit.<sup>19</sup> The compensation is  $66 \frac{2}{3}$  per cent of the average weekly wage of the employee of the preceding year, not to exceed twenty dollars a week and not less than six dollars a week, for a period of weeks determined in accordance with the elaborate scheme determining the period for the various injuries enumerated in the act.<sup>20</sup> The "waiting period" is three

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<sup>13</sup> *Gifford v. Patterson*, 165 N. Y. S. 1043.

<sup>14</sup> Sec. 3.

<sup>15</sup> Sec. 3.

<sup>16</sup> Sec. 13.

<sup>17</sup> Sec. 22.

<sup>18</sup> Sec. 13 (d).

<sup>19</sup> Sec. 14 (b); Secs. 15-22, inclusive.

days, and "no compensation is payable for the first three days or less of disability unless the disability lasts longer than four weeks."<sup>21</sup>

Compensation under the Missouri Act like that under the Acts of the other States is to be deemed in lieu of wages, and is to be paid in the same period as the employee's wages were paid prior to the injury, and in all cases at least once every two weeks.<sup>22</sup> Provision is made whereby the compensation awarded may be commuted and paid in a lump sum in cases where it appears that such commutation will inure to the best interest of the employee, will avoid undue expense or hardship to either party, that the employee or dependent is about to leave the United States, or that employer has sold or otherwise disposed of the greater part of his business.<sup>23</sup> However, the act says that "commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure."

The amount awarded is not assignable, is exempt from attachment, garnishment, and execution. It cannot be the subject of set-off or counterclaim, and in case of insolvency or levy against the employer or insurer, it is entitled to the same priority as a claim for wages. Reasonable attorney's fees, if necessary, may be included in the award, but the amount of such attorney's fees is subject to regulation by the commission.<sup>24</sup>

#### INSURANCE

All employers, electing to accept the provisions of the act must insure their entire liability with some authorized insurer, unless the employer desires to carry the entire liability himself and is able to satisfy the commission as to his financial ability to do so. If the employer fails to insure, the employee may recover as if the employer had rejected the act, the compensation being commuted and immediately payable. An elaborate scheme for the regulation of such insurers and their rates is provided for in sections 28 to 32, inclusive.

When the employer secures insurance, the insurer becomes primarily liable, and the employer is secondarily and indirectly liable.<sup>25</sup> Service on the employer gives the commission jurisdiction over both the employer and the insurer and appearance of the employer constitutes an appearance of the insurer in any proceeding, provided that after appearance of the insurer, the insurer is entitled to notice of subsequent proceedings.<sup>26</sup>

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<sup>21</sup> Sec. 14 (a).

<sup>22</sup> Sec. 48.

<sup>23</sup> Sec. 27.

<sup>22</sup> Sec. 14 (b).

<sup>24</sup> Sec. 23.

<sup>25</sup> Sec. 27.

The employer and the employee can with the approval of the commission, enter into an agreement as to benefits or insurance in lieu of compensation and insurance under the provisions of the act. Such plan, however, must confer benefits equivalent to those conferred in the act, and must not require contribution from the employer. Appeal will lie to the Commission from any decision made under such substituted plan, and such a plan may be terminated by the superintendent of insurance where it appears that it is not fairly administered, or its operation discloses latent defects threatening its solvency.<sup>27</sup>

The parties to a controversy may make a voluntary settlement, provided that no agreement by the employee or his dependents to waive his rights under this act shall be valid nor any compromise will be valid till approved by the commission.<sup>28</sup> As a further limitation, the section also provides that no such agreement shall be valid unless made after seven days from date of death or injury. Similar sections in the acts of other states have done much to lighten the burdens of the commissions, and, if not abused, the Missouri provision for voluntary agreement should prove to be of similar value.

#### THE COMMISSION

The Act provides for a Workmen's Compensation Commission composed of three men, one of whom is to be learned in law, appointed by the Governor by and with the consent of the Senate.<sup>29</sup> The terms of the members of the Commission, except the first appointees whose terms shall be two, four, and six years respectively, shall be six years. At least one of the members must be from each of the two dominant political parties, and one because of previous vocation shall be classed as a representative of employees and another as a representative of employers. They may be removed as members of public service commissions are removed, a procedure regulated by sec. 10414 R. S. Mo. 1919,<sup>30</sup> and vacancies may be filled by the Governor for the unexpired term.

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<sup>27</sup> Sec. 33.

<sup>28</sup> Sec. 35.

<sup>29</sup> Sec. 56.

<sup>30</sup> Sec. 10414 R. S. Mo. 1919:

"The governor may remove any commissioner for inefficiency, neglect of duty, or misconduct in office, giving him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings. The legislature also shall have the power, by a two-thirds vote of all members elected to each house, after ten days' notice in writing of the charges and a public hearing, to remove any one or more of said commissioners from office for dereliction of duty, or corruption, or incompetency."

The commission is empowered to make such rules and regulations as may be necessary to carry out the purpose of the act.<sup>31</sup> The commission or any commissioner has power to issue process, subpoena witnesses, administer oaths, examine books and papers and require the production thereof, and to cause the deposition of any witness to be taken. Any person at any hearing or proceeding failing to obey a command or subpoena without reasonable cause, or refusing to be sworn or examined, or refusing to produce a book or paper or swear to his deposition, is guilty of a misdemeanor and may be prosecuted therefor in the courts of competent jurisdiction, but no provision is made whereby the commission itself may punish as for contempt such disobedience of its orders.<sup>32</sup>

It is the duty of every employer whether he has *accepted* or *rejected* the act to notify the commission within ten days after he has knowledge of any accident resulting in personal injury, and he shall within thirty days file a complete report of such injury or death, such report to be prepared in accordance with the rules of the commission.<sup>33</sup> On receipt of such notice, the commission shall send to the employer and to the employee or his dependents a form of agreement to pay and accept compensation, and if the employer refuses to execute the agreement to pay compensation, the act provides that "the commission shall assist the person who claims to be entitled thereto, in filing his claim and securing an early adjudication thereof." If the parties reach an agreement they shall file a report of the facts and their agreement, and if approved by them the commission is empowered to issue an award thereon.<sup>34</sup>

It is the duty of the injured person to notify the employer by written notice, of any injury and its nature as soon as practicable, and not later than thirty days after the accident, unless the commission shall find good cause for failing to give notice in thirty days, or that the employer was not injured by such delay.<sup>35</sup> No proceeding can be maintained under the act unless such claim is filed with the commission within six months after the injury or death, or in case payments have been made, the claim must be filed within six months after the last payment.<sup>36</sup>

In cases where the employer and employee fail to agree, or have made an agreement and subsequently disagree, either party may make an application for a hearing before the commission. At such hearings, the proceedings are intended, by those who framed the act and as expressed in section 51, to be informal, summary and conducted "without regard

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<sup>31</sup> Sec. 63.

<sup>32</sup> Sec. 34.

<sup>33</sup> Sec. 38.

<sup>34</sup> Sec. 52.

<sup>35</sup> Sec. 36.

<sup>36</sup> Sec. 39.

to technical rules of evidence." However, the obligation to establish a case is incumbent upon the claimant as in judicial proceedings. Courts of other states have said, when construing similar provisions, that the burden rests on claimant to show by competent evidence that an injury has occurred by accident arising out of and in the course of the employment.

The commission or any of its members may hear any party at issue and his witnesses. The evidence is to be taken by a stenographer, and an award made. A copy of the award, findings of fact and rulings of law are then to be sent to the parties in dispute and the employer's insurer.<sup>87</sup>

The commission may of its own motion, or upon the application of a party in interest, on ground of change in condition, review any award after due notice to the parties interested. No such review affects any compensation already paid, however. If such application for review is filed within ten days from date of award, the full commission, if the first hearing was not before the full commission, may review the evidence and make an award.<sup>88</sup>

The final award of the commission is conclusive and binding unless a party to the dispute appeals to the circuit court within thirty days. The appeal may be taken by filing notice of the appeal with the commission. After receipt of notice of appeal, it becomes the duty of the commission to return under certificate all documents and papers on file in the case, a transcript of the evidence, the findings and the award, and these papers compose the record of the case.<sup>89</sup>

The powers of the circuit court on appeal are limited by section forty-four. No additional evidence may be heard, and the findings of fact of the commission are conclusive in the absence of fraud. The court is limited to a review of questions of law, and can modify, reverse, remove or set aside an award on four grounds only, namely, that "commission acted without or in excess of its power," that the "award was procured by fraud," that the findings of fact do not support the award, and that there is insufficient "competent" evidence to warrant making the award. No special provision for procedure in appeal from decisions of circuit courts is made, except that workmen's compensation cases "shall have precedence over all other cases except election contests," the section reading "that appeals from the circuit court shall be allowed the same as in civil actions."

The phrase "sufficient competent evidence" in subsection four of section forty-four is worthy of consideration for it indicates that although section fifty-one reads:

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<sup>87</sup> Sec. 41.

<sup>88</sup> Sec. 42.

<sup>89</sup> Sec. 44.



All proceedings before the commission shall be simple, informal and summary, and without regard to technical rules of evidence, and no defect or irregularity therein shall invalidate the same,

there is a distinction between "competent evidence" and "without regard for technical rules of evidence." The "hearsay rule" has generally been considered not a "technical rule of evidence" as the term is used in compensation laws in sections similar to section fifty-one of the Missouri Act.

The act provides that "any notice required under this act shall be deemed properly given and served when sent by registered mail . . . , notice may also be given and served in like manner as summons in civil action."<sup>40</sup> Referring to that section, Attorney General North T. Gentry, in an opinion rendered to the commission, says, "While we do not hold that notice sent by registered mail would be insufficient, yet we believe the better practice would be for a notice in the form of a summons to be issued by the commission and served in manner provided by law for service in civil actions."

#### WHAT IS AN "ACCIDENT?"

It is to be noted that the act provides only for compensation under its provisions "for personal injury or death by accident," and in section 7b gives the following definition of "accident" and "personal injury":

The word "accident" as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of an injury. The term "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease of infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the workman is at work. "Death" when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident . . . .

Similar provisions are to be found in a majority of the acts in other states, but some confusion in the decisions exists as to what is an "acci-

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<sup>40</sup> Sec. 47.

dent." Moreover, there is to be considered a distinction between "personal injury" and "personal injury by accident."

This distinction is aptly illustrated by Lord Reading in *Trim Joint District School v. Kelly*, when he said, "For example, if a workman became blind in consequence of an explosion at the factory, that would constitute an injury by accident but if in consequence of the nature of his employment, his sight was gradually impaired and eventually he became blind, that would be an injury, but not an injury by accident."<sup>41</sup>

Such a distinction was evidently in the minds of the framers of the Missouri Act when they inserted the words "happening suddenly and violently," and expressly excluded occupational diseases in the definition of "accident." However, in the absence of such an express restriction, an occupational disease has not been considered compensable,<sup>42</sup> except in states where the term "personal injury" is not further qualified by the words "accident" or "accidental."<sup>43</sup>

In the following cases the injury has been held accidental. Assault by an intoxicated fellow employee;<sup>44</sup> assault by section foreman on laborer;<sup>45</sup> assault by pupils on a teacher in an industrial school;<sup>46</sup> murder of cashier for purposes of robbery;<sup>47</sup> asphyxiation by noxious gases;<sup>48</sup> death from heart attack caused by breathing dust laden air;<sup>49</sup> injury occurring while assisting employer in defending person and property;<sup>50</sup> suicide resulting from an accident can be accidental;<sup>51</sup> and suicide where employee jumped from window as a result of an accident resulting in a mental derangement was accidental.<sup>52</sup> Injuries resulting from exposure to elements, if the elements are the same as those to which the general public is exposed, are not accidental, but exposure because of particular duties may be accidental.<sup>53</sup>

As may be seen from the foregoing cases, it is difficult to lay down hard and fast rules which will be applicable to the term "accident" in all

<sup>41</sup> (1914) A. C. 667.

<sup>42</sup> *Workmen's Compensation Acts*, C. J. p. 67, note 38.

<sup>43</sup> *Johnson's Case*, 217 Mass. 388; *Madden's Case*, 222 Mass. 487; *Steel v. Camel Co.*, (1905) 2 K. B. 232.

<sup>44</sup> *In re Employer's Liability Assurance Corporation*, 102 N. E. 697.

<sup>45</sup> *Western Indemnity Company v. Pillsbury*, 170 Cal. 686, 151 Pac. 398.

<sup>46</sup> *Trim Joint District School v. Kelly*, (1914) A. C. 667.

<sup>47</sup> *Nesbit v. Rayne*, (1910) 2 K. B. 689.

<sup>48</sup> *Tarr v. Hecla Coal & Coke Co.*, 265 Pac. 519, 109 Atl. 224; *General Am. Tank Co. v. Weirich*, 133 N. E. 39; *Matthiessen & Higler Zinc Co. v. Ind. Board*, 284 Ill. 378.

<sup>49</sup> *Carrol v. Ind. Com.*, 69 Colo. 473, 195 Pac. 1097.

<sup>50</sup> *Baum v. Ind. Com.*, 288 Ill. 516, 123 N. E. 625.

<sup>51</sup> *Withers v. London B. & Sc. Co. Ry.*, (1916) 2 K. B. 772.

<sup>52</sup> *Sponatski's Case*, 220 Mass. 526, 108 N. E. 466.

<sup>53</sup> *Larke v. Hancock Ins. Co.*, 90 Conn. 303, 97 Atl. 320; *In re Harradan*, 66 Ind. App. 298, 118 N. E. 142; *State ex rel. v. District Court*, 129 Minn. 502, 153 N. W. 119; *Day v. Trimmer*, 176 App. Div. 724, 162 N. Y. S. 602.

cases. The decision in each case must depend essentially upon its own particular facts, and one court has said, "In short, the common meaning of the word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage in all cases."<sup>54</sup>

#### WHAT "ARISES OUT OF AND IN THE COURSE OF HIS EMPLOYMENT?"

These words like the words "personal injury or death by accident," are words common to a majority of the Workmen's Compensation Acts. They serve to exclude the risks to which all people are equally exposed and limit the compensable injuries to those which may be traced in some special degree to the particular employment. Courts have generally considered "out of" and "in the course of" as phrases with different meanings, and that the concurrence of both is essential to recovery.<sup>55</sup> The words "arising out of" referring to origin or cause of accident, being descriptive in character, while the words "in the course of" refer to time, place, and circumstances under which the accident takes place, and refer to character or quality of the accident.<sup>56</sup>

Any attempt to analyze the theory of the various cases arising under this clause is beyond the scope of this article. The following are among the cases which have been held as "arising out of and in the course of the employment:" Injury sustained while the workman was answering the telephone although there was no showing as to whether the call was a personal or a business call was held to "arise out of employment";<sup>57</sup> so also where the building was wrecked and its contents were particularly subject to the strength of a tornado the injury resulted from defects of building;<sup>58</sup> injury from lightning;<sup>59</sup> but the injury by lightning was not in course of employment where a section hand was under shelter during a storm;<sup>60</sup> injury resulting from apple thrown in play;<sup>61</sup> injury to employee who fell downstairs during working hours was incident to employment;<sup>62</sup> so also in the case of an insurance salesman slipping on the ice;<sup>63</sup> but injury to an employee caused by slipping on a banana peel while about the employer's business was not com-

<sup>54</sup> Trim Joint School District v. Kelly, *supra* 46.

<sup>55</sup> McNubb's Case, 215 Mass. 497, 102 N. E. 697.

<sup>56</sup> Fitzgerald v. Clark, 1 B. W. C. C. 197; Deitzen Coal Co. v. Ind. Board, 279 Ill. 11, 116 N. E. 684.

<sup>57</sup> Holland Sugar Co. v. Shraluka, (Ind.) 116 N. E. 330.

<sup>58</sup> Cen. Ill. Pub. Service Com. v. Ind. Com., 291 Ill. 256, 126 N. E. 144; Reid v. Automatic Electric Co., 179 N. W. 323.

<sup>59</sup> Andrew v. Failsworth (1904) 2 K. B. 32; De Luka v. Park Com., 94 Conn. 7, 107 Atl. 11; State Road Com. v. Ind. Com. (Utah) 190 Pac. 544.

<sup>60</sup> Klawinska v. Lakeshore, 185 Mich. 643, 153 N. W. 213.

<sup>61</sup> Leon Bruno v. Champlaine Silk Co., 229 N. Y. 470, 128 N. E. 711.

<sup>62</sup> In re O'Brien (Mass.) 117 N. E. 619.

<sup>63</sup> In re Harraden, 118 N. E. 142.

pensible as all the pedestrians were subject to the same risk.<sup>64</sup> Going to and from work is generally not within the scope of the employment, but there are many exceptions arising from the particular facts of the case. A salesman crossing the street to call on a customer on the way home from work,<sup>65</sup> and a workman going to a locker room after quitting time were within the scope of their employment.<sup>66</sup> Horseplay is generally not within the scope of the employment,<sup>67</sup> as in the case where an employee in play directed the hose of a compressed air apparatus into the anus of a co-employee who was instantly killed,<sup>68</sup> but an injury which was occasioned by horseplay in a washroom when the employee came in contact with an uncovered electric wire was compensable.<sup>69</sup>

The foregoing cases indicate that the question of whether an accident "arises out of or in the course of the employment" is dependent almost entirely upon the particular facts of each case. In general, it may be said that the injury arises in the course of the employment when it occurs while a man is doing what he may reasonably be doing while employed, and at a time within which he may reasonably be considered to be employed; and that an injury arises "out of the employment" when it appears that the duties which he is doing would be considered by reasonable minds to be incidental to his employment.

### CONCLUSION

In conclusion to this explanatory article the author wishes to call attention to the fact that the act is in its very nature a departure from the principles of common law liability which are predicated upon "fault," that the act contemplates an entirely different basis of liability which is frequently referred to as the "trade risk" theory, and that this change of principle is worthy of consideration in understanding problems which may arise under its provisions.

The "trade risk" idea had its origin in a realization by economists and legislators that in a large percentage of cases in which injuries occur neither the employer nor the employee was negligent, but that the injuries were to be expected as an incident to production, and therefore, that the cost of such injuries should be included in the cost of production, and assessed against the consumer in the price of the finished product rather than make the employee who was less able financially, bear the entire burden. Such a basic principle tends to explain the

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<sup>64</sup> *Chapman v. Pearn*, 9 B. W. C. C. 224.

<sup>65</sup> *Bachman v. Watertown*, (Ind. App.) 121 N. E. 8.

<sup>66</sup> *Chfudzinski v. Standard Oil Co.*, 162 N. Y. 225.

<sup>67</sup> *Fissering v. Pillsbury*, 172 Cal. 690, 158 Pac. 215.

<sup>68</sup> *Payne v. Ind. Com.* 295 Ill. 388, 129 N. E. 122.

<sup>69</sup> *Hollenbach Co. v. Holleokeh*, 181 Ky. 262, 204 S. W. 152.

clause "liable irrespective of negligence," the idea that compensation is in lieu of wages, the reluctance to commute the compensation, the simple rules of evidence and procedure, and the almost compulsory insurance, although it strikes a stumbling block in the fact that occupational diseases are excluded, it is of value in reconciling and understanding the purpose of the various provisions of the act.