WHAT IS "WILLFUL MISCONDUCT" WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT IN MISSOURI?

Under the compensation law of Missouri, the employee becomes entitled to an allowance, irrespective of negligence or misconduct on his part, if the injury was sustained while he was engaged in his work. The only defense left to an employer is that the injury was sustained outside of the employment. Such a law is of course enacted not only for the purpose of insuring compensation for an injured employee by distributing the hazard amongst the many, but is also intended to check litigation.

The only section[1] of Missouri's act which opens a door for litigation is the following:

"Nor shall compensation be allowed for an injury or death due to the employee's or another's willful misconduct, including intentional self-inflicted injury, intoxication, and willful failure or refusal to use a safety appliance or perform a duty required by law or failure to obey any reasonable rule adopted by the employer for the safety of the employee, as to all of which the burden of proof shall rest upon the employer."

But what constitutes "willful misconduct" within the meaning of the foregoing clause? Although the compensation laws are new in the United States and England, we are not without numerous definitions of the phrase "'willful misconduct," nor do we lack cases decided by the highest courts of England and by the thirty-odd states in this country which have adopted Compensation Laws in recent years. Indeed, many distinctive features of the American statutes are taken literally from the English Act or are closely modeled thereon. Especially is this true of the so-called "willful misconduct" clauses. Under the English act,[2] it is provided that "if it is proved that the injury to the workman is attributable to the willful misconduct of that workman, any claim in respect of that injury shall be disallowed." . . . The Massachusetts Act of 1911 provides that "if the employee is injured by reason of his serious and willful misconduct he shall not receive compensation."

1. Section 3. Last sentence.
2. 6 Edw. 7c. 58.

In fact, an examination of the compensation laws of the various states, including New York, Wisconsin, California, Ohio and Illinois, contain some provision on the subject of willful misconduct closely modeled after the English Act and very similar, if not the same, as the Missouri Act. Since there is a rather expressed uniformity in such provisions, a review of the decisions of these states will give us an idea of what our courts will say about the "willful misconduct" clause.

In construing the meaning of *willful misconduct,* the following questions will naturally arise: What does the word "willful" mean in its application to the Workmen's Compensation Laws? What is *willful* misconduct as opposed to *contributory negligence?* Does the failure on the part of the workman to use the proper safety appliance necessarily make the act willful as contemplated by the exception under consideration?

I.

What is meant by the word "willful"? According to Burns case (Mass.[3]), the phrase "involves conduct of a quasi-criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with the wanton and reckless disregard of its probable consequences." In a famous English Court of Appeals case, George v. Glasgow Coal Co.,[4] the court in construing the meaning of willful misconduct used the following language: "When an act is momentary and inadvertent, not deliberate, it cannot be said to be willful; willful misconduct must be *willfulness in wrongdoing, knowing the quality of the act.*" Again, it was held, in United States v. Edwards,[5] "that the phrase willful misconduct means a violation of law, knowingly and deliberately committed."

But it is not necessary to go to other states and jurisdictions for the meaning of the expression "willful misconduct." *The term, prior to the enactment of the compensation law, seems to have acquired a rather fixed meaning in Missouri,* although, of course, not used or construed with reference to any workmen's compensation law. The Supreme Court[6] of this state has adopted the following as the definition of willfulness:

Willfulness, a wrongful act, done intentionally, without just cause."

This meaning, which is fundamentally the same as is found in the

3. 218 Mass. 158.
4. George v. Glasgow Coal Co. App. cas. 190 (Eng. 123).
5. Peck v. Taubamm, 251 Mo. loc. cit. 423. See also Schmacher Distillery Case, 170 Mo. App. 361.
6. 43 Fed. 67 (C. C.)

Burns case, and in George v. Glasgow, *supra;* excludes any degree of negligence and includes only wanton and intentional acts—those in which there is "intent, actual or constructive." Therefore, since it is reasonable to assume that the legislature had in view the Supreme Court's definition when they drew up the Compensation Act, and since the construction of the word in compensation cases is fundamentally the same as definition of our Supreme Court, it can be concluded that there must be a "*mens rea*" condition of the mind bordering on criminality in refusing compensation.

II.

It has been pointed out in a previous paragraph that, notwithstanding contributory negligence of the employee, compensation will be allowed for injuries, except in the cases of willful misconduct. The question which then arises is: In what respect does willful misconduct differ from contributory negligence? What is the border line between the two? If the abstract definition of the words "willful misconduct" as construed by the courts of the state is kept in mind, the differentiation is not very difficult. Neither carelessness, amounting to gross negligence, nor evidence of mistake can amount to *willful misconduct.* The facts of the case must point to a deliberate act, or failure to act, or intoxication operating as the proximate cause of the injury.

The Arbitration Board of Michigan[7] discussed the point of "'willful misconduct" and "contributory negligence" within the meaning of the Workmen's Compensation Act upon the following facts: Deceased was working as a carpenter on the roof of a building being constructed by the defendant. Since the weather was cold, the foreman called to the deceased to come down for some hot coffee, it being the custom to serve the men with hot coffee in cold weather. Deceased, instead of descending by the usual extension ladder, used a rope, and in some manner lost his hold and was killed. In ruling upon the points raised by the defendant that the injury was not one arising out of, and in the course of employment, and that it was the result of the workman's intentional and willful misconduct, the board said:

"Mere negligence, or even gross negligence, will not defeat compensation. If the deceased's plans had carried, he would have had only a drop of five or six feet. There is scarcely a healthy boy today who does not take a greater chance and without harm. For a man accustomed to physical toil, it cannot be said that such an act should be characterized as willful misconduct."

7. Clem. v. Chalmers Motor Co., 178 Mich. 340.

Another decision directly in point is a case of the Indiana Court of Appeals.[8] The evidence in this case tended to show that it was customary for the workmen of a plant to quit actual work fifteen minutes before going off duty for the purpose of washing their hands. Usually, in order to heat water, they heated a bar of iron and dropped it into a pail of water. All this was done with the knowledge and acquiescence of the employer. On the day of the accident, the fires in the furnaces had gone out, and heating water by the usual method could not be accomplished. Applicant, when preparing to leave the plant, went into an adjoining room and there saw a tank filled with hot liquid which had the appearance of water. This liquid, however, was an explosive acid. Applicant, thinking it to be water, placed a pail of cold water therein for the purpose of heating it. An explosion followed and applicant was seriously burned about the face and arms.

Clearly, the point to be decided in this case was whether the applicant was guilty of "willful misconduct." The custom of washing was acquiesced in by the employer. He had provided no other means of washing. True, the evidence of mistake points to gross negligence, but the gross negligence in this case has not the slightest tone of intentional wrongdoing. To say that mere negligence is willful misconduct would mean to maintain the very rules the law intends to abrogate. The injured workman recovered compensation because the employer failed to prove willful misconduct *from the facts.*

However, it would be considered "willful misconduct" in a case[9] where a proposed operation for a cataract on the eye of an employee would not be attended with any risk, and appeared to be such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. It is the duty of such employee to have the operation performed, and upon unreasonable refusal the continued loss of sight would be attributed to his refusal and not to the accident. Of course, if it is the case of a foreigner who does not understand instructions, or the result of the operation is problematical, it is not a bar to compensation in the event of refusal to undergo operation. In short, the employee must try to avoid unreasonable aggravation of the injury.

Again, in the cases of obvious dangers, where, let us say, a miner was injured in crossing a shaft which was regarded as *notoriously dangerous,* although there was no rule prohibiting miners from crossing it, such an action would be "willful misconduct." The intentional

8. Ind. App. Cas. N. E. 386 (1918).
9. Supreme Court of Illinois. Joliet Motor Co. v. Ind. Board Ills., 280 Ills. 148.

doing of something with reckless disregard of the known and probable consequences is manifested here.[10]

In addition, intoxication, when it occasions injury, amounts to "willful misconduct": for under the express terms of Missouri's act, injury or death due to intoxication is willful misconduct. The real test in such a case is to prove whether or not the workman was actually intoxicated. Such a discussion is beside our question.

In view of the above decisions, we find that *willful* misconduct is distinct from *contributory negligence*. The willful misconduct clause contemplates *an intentional and willful act, or failure to act, on the part of the employee, who knows the consequences of his act at the time he does it, or the consequences of his failure to act, and intends and wills that the result shall follow*. *Gross negligence* may be found to be a fact where willful misconduct does not exist, and so the employee receives compensation.

III.

Is a workman guilty, as a matter of law, of willful misconduct because he has violated rules and orders laid down by the master for the protection of the servant? True, according to the words of the willful misconduct clause in the new act, "failure or refusal to use a safety appliance, or failure to obey any reasonable regulation adopted by the employer for the safety of the employee, shall be deemed willful misconduct." But suppose the rule was so poorly enforced that it was unknown to the employee, shall a violation of that rule be deemed willful misconduct? Our attention is called to the following case:[11] Applicant worked as a hand hammerer for the defendant. There was a danger that chips flying about would injure the eyes of the workmen. Defendant on a given day purchased goggles and posted a small notice near the tool clerk's window, stating that the goggles were available and requiring their use by the hammerers, and further stating that injuries through failure to use them would be at the employee's risk. The foreman testified that he had attempted to bring the notice on paper slips to the attention of the employees, but it appeared that his efforts were directed chiefly, if not solely, to the machine workers, and that the hand workers had been permitted to continue work without goggles. Applicant testified that he had never seen nor heard of this notice or rule, and that he had been employed in other shipbuilding yards, and there had never been a practice of requiring workmen to wear goggles. In the course of his opinion, the judge in this case said:

10. Leishman v. Dixon Co. (1910) 47 Scotch L. R. 410.
11. McClelland v. Fore River Shipbuilding Co., Mass. W. C. C. 122.

"It seems clear that there had been no real effort to enforce this rule. If a rule is unknown to an employee, can the violation of that rule be willful misconduct? There is no element of intentional wrongdoing present, or a willful disobedience of a regulation."

Nor can the infraction of a rule, habitually violated by the employee, be said to be willful misconduct. The judge in Casey v. Humphries[12] found that a girl fourteen years old employed as a soda bottler was not guilty of willful misconduct in neglecting to wear gauntlets which had been furnished by the employer, and which by the special rules of the establishment and by special orders given directly to the workmen she was required to use, where the evidence showed that the forelady had allowed her to disregard the rule, but verbally told her to put them on "when the boss was around."

In further support of the proposition that the violation of rules for the safety of the employee does not, as a matter of law, render the employee guilty of willful misconduct, we quote from Deistelhorst v. Ind. Acc. Bd. Cal.[13] In this case a minor was engaged as a helper around a gold dredge. He had been instructed by his employer on two occasions not to oil the machinery while it was in motion, and had been warned frequently of the danger in so doing. At the time of the injury, the power had been shut off, but the machine was running on its own momentum. For the purpose of saving time, and without at the time being mindful of the orders and warnings, the employee attempted to oil the machinery and was injured. It was contended by the employer on a petition to annul the award in favor of the injured employee that the latter's violation of instructions amounted to willful misconduct. In affirming the award the court said:

"The violation of a rule known to the party would of course raise the presumption that it was done deliberately and intentionally, but it is a disputable presumption. May not a person, although guilty of the infraction of an order for his benefit, show that at the time he was unmindful of the order and that his act was the result of inattention and thoughtlessness? When a person violates a known rule, it should be held ordinarily that he does it deliberately, but we do not think that the door should be closed entirely against such injuries, at least in the case of a mere child. We hold that the voluntary failure on the part of the workman to use a proper safety appliance does not necessarily make the act willful as contemplated by the exception under consideration.

But a workman is guilty of willful misconduct where he delib-

12. 6 W. C. C. 520 (Eng.).
13. Deistelhorst v. Ord Acc. Com. Cal., 32 Cal. App. 771.

erately violates a rule with the knowledge at the time of the violation. Where a company[14] had issued a rule forbidding the driver or fireman to leave the running board while the engine was in motion, and an engine driver had climbed back on the tender to get a better quality of coal for the purpose of making up lost time, and was killed by being hit by a bridge over the track, the court held that the violation of this rule was willful misconduct as precluded the dependants of the driver from recovering compensation. Here the workman did a dangerous act, knowingly, and contrary to the expressed orders of the company. So it was held in the case of the Great Western Power Co. v. Pillsbury,[15] that the failure to use rubber gloves while working with "live wires," as the rule of the employer required, was willful misconduct, which was a bar to the recovery of compensation. Still another illustration of the willful failure to use the proper safety appliance is found in the case of the Bayshore Laundry Co. v. Ind. B. Cal.[16] Applicant while operating a wringing machine in the defendant's laundry, removed a guard, and by reason of such removal, his hand and arm were caught in the machine. The facts show that if he had not removed the guard, the injury would not have happened. According to the testimony of the applicant, he performed the act for the definite purpose of gaining time. Is this not evidence that his act was intentional, deliberate, and willful? He was an experienced laundryman, and understood the mechanism of the machine perfectly. He knew that the guard was provided for his protection and to prevent accidents. There is no doubt that his act constituted *willful misconduct.*

A review of the cases cited convinces us that the whole section under consideration resolves itself into a question of whether or not the employee, according to the facts of the case, is guilty of *willful misconduct.* The mere violation of an order will not of itself defeat compensation, unless it can be shown that the injured employee was guilty of willful misconduct. The willful misconduct clause, to repeat a previous statement, contemplates *an intentional and willful act, or failure to act, on the part of the employee, who knows the consequences of his act at the time he does it, or the consequences of his failure to act, and intends and wills that the result shall follow.*

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14. Bist v. London & Southwestern Ry. Co. (1907) 9 W. C. C. 19.
15. Great Western Power Co. v. Pillbury, 149 Pacific Reporter 35.
16. Bay Shore Laundry Co. v. Ind. B. 172 Pac. 1128 (1918).