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Robert Wallenmeyer v. Industrial Comm. of Utah, Valley Cargo, and Continental Insurance : Reply Brief

Utah Court of Appeals

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Robert B. Breeze; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

Robert Wallenmeyer,

PETITIONER/
CLAIMANT,

v.

Industrial Comm. of Utah,
Valley Cargo, and
Continental Insurance,

RESPONDENTS.

COURT OF APPEALS
No. 890561CA

Category 6

REPLY BRIEF OF PETITIONER ROBERT WALLENMEYER

PETITION FOR REVIEW OF INDUSTRIAL COMM. ORDER

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ISSUE ON APPEAL

The issue to be determined is whether or not the Industrial Comm. erred when it ruled that the injury to petitioner did not occur in the course of his employment.

SUMMARY OF ARGUMENT

1. The fact that the injury relevant herein occurred during a lull in employment is a factor of considerable importance to a proper analysis of this case. During a lull in employment duties when an employee must wait for working conditions to be readied it is foreseeable that the worker will not sit with his hands folded in contemplation and that the worker will engage in conversation and even horseplay activities.

2. The defendants did not raise the issue of "arising out of employment" below and are therefore foreclosed from raising the issue on appeal. Should the court decide to consider the "arising" issue it will find the law in a state of confusion. There are at least three major schools of thought regarding the "arising" issue and it is possible that the Prows case created a unique "arising" test for Utah horseplay cases. In any event the injury to this worker "arose" from his employment duty, i.e. to wait.

POINT I

A LULL IN EMPLOYMENT IS AN IMPORTANT FACTOR IN A COURSE OF EMPLOYMENT ANALYSIS

Petitioner has addressed the question of "course" of employment in some depth in his original brief. The fact that the incident relevant herein occurred during a lull in employment deserves additional commentary.

According to Professor Larson at Larson § 23.65, "Most cases give considerable weight to this factor [lulls in employment] in dealing with participants in horseplay". Larson goes on:

> "Employers, whose work requires that men wait upon the job for work conditions, ought not to be heard to say that an accident, occuring out of the very conditions presented by the required waiting, is not compensable."
> "Men standing and waiting around an open fire on a damp December day naturally mill around and talk and even , joke and indulge in what might be termed 'horseplay.'"

Petitioner asserts that the Commission reached the wrong legal conclusion regarding the "course of employment" issue based upon the facts in the record especially when the fact that a lull in employment existed is considered.

As will be more fully addressed infra Professor Larson views horseplay as a course of employment

issue rather than an arising issue.

POINT II

PETITIONERS INJURY AROSE OUT OF HIS EMPLOYMENT

The issue of whether this particular claimant's injury "arose out of his employment" was not raised or addressed below. Claimant takes the position that the employer has waived the issue by failing to raise it. However, because of the 1988 amendment of §35-1-45 which required that the injury both arise out of **and** in the course of employment and the fact that no Utah appellate court has addressed the amended version of §45 the petitioner submits the following argument, discussion and authorites for the edificationof the Utah Court of Appeals.

Utah's leading horseplay cases, Prows and J. & W. Janitorial were both decided prior to the 1988 amendment of §35-1-45 Utah Code. The employer correctly points out the the amendment altered the statute so that an injured worker had to show that the accident both arose out of and in the course of employment.

According to Professor Larson, §6.10, The Law of Workmen's Compensation, Utah was the only state that used the disjunctive "or". Most states have long required that a claimant satisfy both the arise out of and course of elements in order for an injury to be compensable. The 1988 amendment

merely brought Utah into the mainstream of workmen's compensation law.

From the 1988 amendment to §45 the employer jumps to the erroneous conclusion that injuries from horseplay can "never arise out of employment". See the brief of respondent at pg. 4. It is interesting to note that the employer twice makes this bold assertion without supplying **a scintilla of legal authority** to support its position.

As Professor Larson points out most states require that both the "arise" and "course" prongs be satisfied. Yet these very states which require the fulfillment of both prongs also allow recovery for horseplay. Oregon at 204 P. 151, Oklahoma at 49 P.2d 1065 and Colorado at 318 P.2d 216. These cases are not cited as being factually on point with the instant case. They are cited only to show that "and" states allow recovery for horseplay in some circumstances, demonstrating that the assertion made by the employer without citation to authorites is unfounded. Cites taken from Larson.

In Prows v. Industrial Comm., 610 P.2d 1362 (Ut. 1983) the Utah Supreme Court, in a somewhat confusing opinion, seemed to apply the 4-part test advocated by Larson and adopted by the Court to both the arising and course criteria. Prows at 1367 (last paragraph). This approach seems acceptable to Professor Larson who states at §23.60 of

his Treatise that: "Whenever the basic controversy stems from the nature of a course of conduct deliberately undertaken by the claimant, there is primarily a question of course of employment." (Underscoring added). Larson goes further: "The 'arising out of employment' issue, once it has been decided that the horseplay activity itself was no deviation from employment, can usually be easily disposed of." "...the arising out of employment" issue can simply be met by the argument that if the activity itself qualifies as part of the employment, and the horseplay arose out of that activity, then the harm arises out of the employment of which that activity was a part." This approach may be the same that was undertaken by the Utah Supreme Court in Prows.

Larson at §6.10 says in reference to the "arising out of and in the course of employment statutory language that, "Few groups of statutory words in history of law had to bear the weight of such a mountain of interpretation as has been heaped on this slender foundation". Larson goes on: "...it should never be forgotten that the basic concept of compensation coverage is unitary, not dual, and is best expressed in the term "work connection".

As to the very complex matter of determining when an injury arises out of employment Professor Larson at §6.20 et. seq. of his Treatise identifies **five lines of interpretation** of which two are obsolete. The three current schools of thought on the arising out of issue are:

1) Increased risk theory. This is the most prevalent theory and can be satisifed by showing that the employment increased the risk of the exposure.

2) Actual risk theory. This theory is followed by a substantial number of court that say: "We do not care whether the risk was also common to the public, if in fact it was a risk of this employment".

3) Positional risk theory. "An important and growing number of courts are accepting the full implications of the positional-risk test". An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations fo the employment placed the claimant in a position where he was injured." At §23.10 Larson says: "...The claimant was injured not merely while he was in the factory, but because he was in the factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment."

CONCLUSION

It is clearly wrong to make the assertion that an injury occurring during horseplay can never arise out of employment. Depending on the circumstances of the particular case an injury occuring during horseplay may arise out of employment if:

A. There is a work connection; or

B. The horseplay did not amount to a substantial deviation; or

C. The jobsite increased the risk; or

D. Horseplay was an actual risk of employment; or

E. But for the employment, the claimant would not have been in a position to be injured.

Under the facts of the instant case, based upon the lull in employment and the facts found by the A.L.J. Mr. Wallenmeyer is entitled to compensation.

Dated this 24 day of March, 1990.

Robert Breeze

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing reply brief to:

Henry Chai, Attorney, Box 45000, Salt Lake City, Utah 84145

and

M. Gale Lemmon, Counsel for Industrial Comm., Box 510250, Salt Lake City, Utah 84151-0250

on the 26 day of March, 1990.