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COMMENTS

WORKMEN'S COMPENSATION—EMPLOYEES IN DUAL ACTIVITY

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The recent case of *Muck v. Snohomish County PUD*[1] presented an issue involving the compulsory coverage of the Industrial Insurance Act,[2] more commonly known as Workmen's Compensation, which has been a confusing question in several other cases, and does not yet seem to be finally resolved. There an employee was a sales manager for an electrical appliance store, and his occupation as such did not bring him under the compulsory provisions of the Act. No industrial insurance premiums were paid for his time. On the day of his death, he accompanied the serviceman to a customer's house where they were to install a television set and erect a temporary outside antenna. This work is included by the statute as "extrahazardous" work, and comes under the compulsory provisions of the Act. While Muck was holding the antenna for the serviceman it came in contact with high tension wires maintained by the defendant, and Muck was electrocuted. His widow sued the defendant for negligently causing her husband's death, and as a defense to this action the defendant contended that Muck was engaged in covered employment at the time of his death and therefore his widow was foreclosed from suing at common law under the immunity provisions of the Workmen's Compensation Act.[3] Muck was found not to be covered by the Act; therefore, the action in tort could be maintained.

To point up this problem which is the topic of this comment, a brief reference to the facts of an older case will be helpful. In *Everett v. Department of Labor and Industries*,[4] Everett was the resident manager and supervisor of the waterworks, and his duties included operating the plant, and also collecting the accounts due the company. On the day of his death he was in a local card room, attempting to collect an old

[1] 41 Wn.2d 81, 247 P.2d 233 (1952).
[2] RCW 51. [RRS § 7673].
[3] RCW 51.24.010 [RRS § 7675].
[4] 167 Wash. 619, 9 P.2d 1107 (1932).

account from a customer of the waterworks. When he accused the customer of pilfering water, Everett was shot and killed. Everett's widow was held to be entitled to compensation under the Industrial Insurance Act.

At first glance, these two cases seem to be curious interpretations of the Workmen's Compensation Act. In the Muck case the employee would appear to have been engaged in covered work, and was killed by one of the hazards which prompted the legislature to include such work under the compulsory provisions of the Act. On the other hand, *Everett* would appear to be doing work which was not covered by the Act, and was killed by a hazard not at all peculiar to the operation of a waterworks. These two cases demonstrate that when an employee is engaged in two kinds of work, one of which is covered and the other not, the question of his coverage at the time of injury or death is an important issue for two reasons: (1) coverage is a defense to an action in tort against his employer or a third person employer who is also engaged in covered work, and (2) coverage determines the employee's right to compensation from the state accident fund. The reasoning behind the two decisions will be discussed later in this comment.

In a great many businesses the employer may have two or more departments or operations, some of which are within the compulsory coverage of the Act and some of which are not. Further, a single employee's duties may be varied, and his employment may include duties in more than one of the employer's operations or departments.[5] The employee may be regularly engaged in covered employment for part of his working time, or may perform such work only occasionally as part of his duties. It is the purpose of this comment to discuss the cases presenting this problem and to suggest statutory changes which would diminish the uncertainty in determining the right to compensation with its corresponding abolition of tort action when such an employee is injured in the course of his employment.

Four sections of the Workmen's Compensation Act are material in determining a particular employee's right to compensation. The persons covered are the employees engaged in the enumerated or covered work, and these persons are denominated workmen. Their right to compensation is established in RCW 51.32.010 [RRS § 7679] "Each workman injured in the course of his employment, or his family or dependents

[5] Also, one employee may work for two employers, one of whom is engaged in covered work and the other in non-covered work. Lunday v. Department of Labor and Industries, 200 Wash. 620, 94, P.2d 744 (1939).

in case of death of the workman, shall receive out of the accident fund compensation in accordance with this chapter, and except in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever: . . ."

A workman is defined in the Act as including ". . . every person in this state who is engaged in the employment of an *employer* under this title, whether by way of manual labor or otherwise in the course of his employment; . . ." (italics supplied)[6]

As this definition refers to the term "employer," an examination of the definition of that word becomes necessary. An employer is defined as ". . . any person, body of persons, corporate or otherwise . . all while engaged in this state in any *extrahazardous* work, by way of trade or business, . . ." (italics supplied)[7]

Because this definition uses the word "extrahazardous," the meaning of that term must be established. The Act states that: "There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently hazardous works and occupations, and it is the purpose to embrace all of them . . *in the following enumeration,* and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to-wit . . ." (italics supplied)[8]

There follows an enumeration of industries and occupations covered by the Act. In addition, the Director of Labor and Industries has the power, after notice and hearing, to include other occupations not enumerated by the statute within the compulsory provisions of the Act.[9] Even though a particular occupation is in fact a very dangerous one, it is not "extrahazardous" unless it is listed by the statute or included by the Department of Labor and Industries.[10]

Considering these four sections of the Act together, we find that the persons covered by the Act are "workmen" who work for an "employer" engaged in "extrahazardous" work. It appears to have been the

[6] RCW 51.08.180 [RRS § 7674-1] " . . also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his employment."

[7] RCW 51.08.070 [RRS § 7675] " . or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, in extrahazardous work."

[8] RCW 51.12.010 [RRS § 7674a].

[9] RCW 51.12.040 [RRS § 7674]. There are also elective coverage provisions. RCW 51.12.110 [RRS § 7679].

[10] Parker v. Pantages, 143 Wash. 176, 254 Pac. 1083 (1927).

original intention of the Act to include certain employers and the persons entitled to compensation were to be those who worked for these employers, regardless of the nature of their duties, and regardless of the fact that they might not be in a proximate relation to the ordinary hazards of the business when injured.

Coverage of a particular employee under this approach would be relatively easy to determine. His right to compensation would depend on the general nature of the employer's business, premiums would be paid for all of his time, and his right to benefits would accrue without regard to the nature of his work at the time of his injury, so long as he was in the course of employment at the time. On the other hand, a man employed by an employer not enumerated by the statute nor included by the Director, but who performed work in an occupation so enumerated, would not be entitled to compensation. For convenience, this will be called the "employer's business" approach to coverage. As stated, this appears to have been the original statutory approach to determination of the right to compensation.

The interpretation of statutes depends, however, on decisions. Three years after the Workmen's Compensation Act of 1911 was enacted, the question of compulsory coverage of employees arose in *Wendt v. Ind. Ins. Comm.*,[11] where a carpenter was employed by a department store. A department store as a business was not within the coverage of the Act, but the store maintained a repair shop with a carpenter's bench and some power machinery Wendt, the carpenter, was killed when he attempted to turn on the electric current to start the grindstone to sharpen a chisel. The claim of Wendt's widow was denied by the Industrial Insurance Commission (now the Department of Labor and Industries), but was allowed by the superior court. On appeal, the commission urged that Wendt's widow did not qualify for compensation since Wendt was employed by a department store, whose principal business was not listed as "extrahazardous" by the Act. The "employer's business" approach was rejected by the court, and it was indicated that coverage and the right of compensation would be found: "If the employer conducts any department of his business, whether large or small, as an extra hazardous business within the meaning and defined terms of this Act, "[12] As Wendt had been employed in a "workshop where

[11] 80 Wash. 111, 141 Pac. 311 (1914).
[12] *Id.* at 117, 141 Pac. at 313.

power machinery is used"[13] he was covered by the Act and his widow was entitled to compensation for his death.

With this case and *State v. Business Property Security*,[14] which held that such employers must contribute to the accident fund for employees working in covered departments of a generally non-covered business, it became clear that the general nature of the employer's business was not necessarily the controlling factor in determining coverage of a particular employee. Rejecting the "employer's business" approach, suggested by the Act, the court began to look to the actual duties of the particular employee to determine whether he qualified as a "workman" and, consequently, for the benefits of the Act. The statutes defining "workman" and "employer" have not been changed in this respect, and the statute appears to take one approach while the cases take another.[15]

Since the *Wendt* and *Business Property Security* cases, the existence of two approaches to compulsory coverage has engendered a great deal of confusion in the later decisions. In several cases, an employee actually engaged in an occupation or work enumerated by the statute at the time of his injury has been denied compensation on the ground that his employer was not engaged in that occupation as a trade or business.[16] In others employees engaged in one of the enumerated occupations have recovered compensation despite the fact that their employer's business was not enumerated by the statute nor included by the Department of Labor and Industries.[17] The fact that this split exists indicates a need for a re-examination of this question of compulsory coverage, to the end that a consistent approach will be used in all cases.

The problem is further confused by the enumeration of works and

[13] RCW 51.12.010 [RRS § 7674a].

[14] 87 Wash. 627, 152 Pac. 334 (1915).

[15] These definitions have been amended in other respect, in an effort to include independent contractors. See *supra*, notes 6 and 7.

[16] Dingman v. Department of Labor and Industries, 157 Wash. 336, 288 Pac. 921 (1930); Edwards v. Department of Labor and Industries, 146 Wash. 266, 262 Pac. 973 (1928); Johnson v. Department of Labor and Industries, 182 Wash. 351, 47 P.2d 6 (1935), LaPoint v. Pacific Coast Strappers, 169 Wash. 71, 13 P.2d 71 (1932); Thompson v. Department of Labor and Industries, 194 Wash. 396, 78 P.2d 170 (1938), Guerrieri v. Industrial Insurance Commission, 84 Wash. 266, 146 Pac. 608 (1915), Carsten v. Department of Labor and Industris, 172 Wash. 51, 19 P.2d 133 (1933).

[17] Wendt v. Industrial Insurance Commission, *supra* note 11, Berry v. Department of Labor and Industries, 11 Wn.2d 154, 118 P.2d 785 (1941), Replogle v. Seattle School District No. 1, 84 Wash. 581, 147 Pac. 196 (1915), and see the approach used in: Gowey v. Seattle Lighting Company, 108 Wash. 479, 184 Pac. 339 (1919); Muck v. Snohomish County PUD, *supra* note 1; Amsbaugh v. Department of Labor and Industries, 128 Wash. 692, 224 Pac. 18 (1924); Lindquist v. Department of Labor and Industries, 184 Wash. 194, 50 P.2d 46 (1935); DeHaas v. Cascade Frozen Foods, 23 Wn.2d 754, 162 P.2d 284 (1945).

occupations in the statute,[18] in which businesses of employers and activities of employees are indiscriminately mixed together. For example, the statute includes "gasworks, waterworks, reduction works, breweries " and in the same list includes "installing and servicing radios and electrical refrigerators," and "employees supplying service to the public in hotels, clubs furnishing sleeping accommodations, apartment hotels;" Of course, the statute does not provide compensation for a business as such, but rather to the workmen employed in such a business, but when this mixed approach to coverage is considered in connection with the statutory definitions of "workman" and "employer," the ambiguity of the statute is obvious. To solve the analytical difficulty, it must be said that when a particular employee is engaged in a covered occupation for an employer whose business is not covered, the employer himself is engaged in extrahazardous (covered) work as to that employee by virtue of the fact that the employee is so engaged.

It is important to note at this point that the types of work and occupations enumerated by RCW 51.12.010 [RRS 7674a], as well as other occupations, are classified in RCW 51.20 [RRS 7676b] for the purpose of determining the amount of the insurance premium payable by the employer for each workman-hour. The court has on several occasions used the language of these classifications, not for premium calculation, but to determine the *scope* of coverage of the particular occupation or work. For example, in *Everett v. Department of Labor and Industries,*[19] the court used the words "waterworks, (operation)" found in the premium classification section of the statute, to determine that employees engaged in the "operation" of a waterworks were within the Act. It is submitted that this method of determining the scope of coverage is questionable, and that the statute including occupations or the list of departmental inclusions should control coverage and the right to compensation, rather than a breakdown of work catagories and occupations which is made for the purpose of computing contributions to the accident fund.[20] The statutory list of covered employments is very brief and general, which is probably the reason why the court has found it necessary to use these classifications to determine the scope of coverage.

The problem of determining the right to compensation is further

[18] RCW 51.12.010 [RRS §7674a].
[19] See note 4 *supra.*
[20] DeHaas v. Cascade Frozen Foods, 23 Wn.2d 754, 162 P.2d 284 (1945).

complicated when an employer is engaged in two operations, one covered and the other not covered, and a single employee has duties which carry him into both departments or operations. The cases clearly establish the rule that the employee must be engaged in covered work at the time of his injury to be entitled to compensation.[21] This is sometimes called the "pinpoint" rule. A few illustrative cases will demonstrate the difficulty which the court has encountered in applying this rule.

In *Everett v. Department of Labor and Industries*,[22] referred to earlier, the employee had duties which required him to work part of his time at a waterworks plant and part of the time he was required to collect accounts due the employer. He was shot and killed while attempting to collect an old account when he remonstrated the debtor for pilfering water from another's outlet. The court found that Everett (the employee) was engaged in covered employment at the time of the injury because collecting accounts was "inseparably interwoven with, and a part of" the operation of the waterworks, and thus his widow was entitled to compensation under the Act. In this case, the pin-point rule was given a broad construction, making coverage co-extensive with the workman's entire course of employment, and apparently taking the "employer's business" approach to coverage of the workman at the time of injury.

This liberal view of the right to compensation was soon re-examined in *Denny v. Department of Labor and Industries*.[23] There the employee's duties required him to solicit freight business in the morning, and in the afternoon he worked in the warehouse itself, moving and handling freight. The court again used the language of the classification of occupations, and found "team and truckdriving (includes all warehouses operated by transfer companies)" and "auto freight transpor-

[21] In D'Amico v. Conquista, 24 Wn.2d 674, 167 P.2d 157 (1946), the court set out four conditions which must exist at the time of an injury in order to entitle one to the benefits of the act. "First, the relationship of employer and employee must exist between the injured person and his employer (except in some cases where the injured person is an independent contractor); second, the injured person must be in the course of his employment; third, that the employee must be in the actual performance of the duties required by the contract of employment; and fourth, the work being done must be such as to require payment of industrial insurance premiums or assessments." *Id.* at 679, 167 P.2d at 160. The injury, however, need not have been caused by a hazard inherent in the business or occupation. See Everett v. Department of Labor and Industries, note 4 *supra* (shooting), Stertz v. Industrial Insurance Commission, 91 Wash. 588, 158 Pac. 256 (1916) (shooting), Boeing Aircraft Company v. Department of Labor and Industries, 22 Wn.2d 423, 156 P.2d 640 (1945) (aircraft crashing into meat packing plant); Comment, 20 WASH. L. REV. 150 (1945).

[22] See note 4 *supra*.

[23] 172 Wash. 631, 21 P.2d 275 (1933).

tation" to be covered employment. Denny had not yet begun his afternoon work, and was injured when he fell from a chair in the office of the warehouse. After an extensive discussion of the problem, the court held that Denny was not engaged in covered employment at the time of his injury and therefore was not entitled to compensation for his injury Denny's counsel had relied on the *Everett* case, but the court held that Denny's duties of soliciting freight were not "essentially a part of the business of auto freight transportation."[24]

When the employee's activity in the *Denny* case is compared with the work done by the employee in the *Everett* case, the difficulty of determining the right to compensation when the employee is injured while engaged in work not directly related to the hazards of the enumerated business or occupation becomes apparent. In almost any case where an employee is temporarily separated from the hazards of a particular business or occupation, but still within the course of his employment, it could be asserted that the employee's duties were "incidental to, intimately connected with, and essentially a part of" the occupation classified as extrahazardous.[25] Otherwise, why would the employee be hired to perform the work? On the other hand, if it can be shown, as in the *Denny* case, that there is a "clear line of demarcation" between his duties close to the hazards of the business and his duties away from those hazards, the employee will not be entitled to compensation if he is injured while performing the latter, although he is within the course of his employment. This state of the law is unsatisfactory because of the uncertainty in determining the right to compensation when an employee is injured, and because of the difficulty in determining a proper insurance premium to be assessed against the employer for the hours of employees engaged in such dual employment. A rule which finds an employee flitting in and out of coverage several times a day as his duties change their character, regardless of whether insurance payments have been made for the workman's time, should be abandoned or changed in favor of a rule which promotes certainty, and bears some reasonable relation to an actual insurance program based on premiums paid for the workman's time at work.

This question arose again in *Morris v. Department of Labor and Industries*.[26] Morris and another man were in charge of a branch office of

[24] *Id.* at 643, 21 P 2d at 279.
[25] Everett v. Department of Labor and Industries, 167 Wash. 619, 625, 9P.2d 1107, 1109 (1932).
[26] 179 Wash. 423, 38 P.2d 395 (1934).

an electric power company. His duties included outside installation and service work, and also the securing of new contracts and making collections. On the day of his injury, while Morris was on 24-hour storm call, he was directed to contact the operator of a motion picture theater to secure a contract for power. He did so in the evening, and while there he attended the movie with a young lady friend. After the show Morris was driving home on the same route which he would have taken had he not stayed for the movie, and was injured when his car was crowded off the highway by another car. When he appealed from the Department's denial of his claim for compensation, the court said that when an employee has two phases of his job, one of which is in covered work, and one of which is not, he is entitled to compensation even when temporarily engaged in the non-covered work, if those duties are "incidental to, intimately connected with, and essentially a part of"[27] the occupation classified by the statute as covered employment. The court approved both the *Everett* and *Denny* cases, found Morris to be within the rule of the former, and held that he was entitled to compensation.

At least three other cases have reached the Supreme Court where the employee's duties involved both covered and non-covered work, and the injury occurred when the employee was temporarily away from the hazards of the covered occupation.[28] All three were automobile accident cases, and in each the injured employee failed to bring himself within the rule of the *Everett* and *Morris* cases and was denied compensation.

Muck v. Snohomish County PUD,[29] previously discussed, differs from the other dual activity cases in two ways. First, while Muck was employed generally in non-covered employment, his injury occurred when he was in proximity to the hazards for which a covered occupation is classified. Second, Muck apparently was not regularly engaged in installing radios, but rather his normal duties were those of a sales manager in an appliance store, not covered by the statute enumerating included occupations. Muck's widow was found not entitled to Workman's Compensation benefits and therefore could maintain the action for negligence, because, although Muck was apparently within the

[27] *Id.* at 430, 38 P .2d at 397

[28] Maeda v. Department of Labor and Industries, 192 Wash. 87, 72 P.2d 1034 (1937), Hill v. Department of Labor and Industries, 174 Wash. 571, 25 P.2d 568 (1934), Sheldon v. Department of Labor and Industries, 168 Wash. 571, 12 P.2d 751 (1923), *but see* Lunday v. Department of Labor and Industries, 200 Wash. 620, 94 P.2d 744 (1939).

[29] See note 1 *supra*.

scope of his employment when killed, he was not "engaged in duties required of him either by his contract of employment or by specific direction of his employer."[30]

The court disposed of Muck's right to compensation by approving the jury's finding that he was a volunteer while engaged in the covered work, but the necessary inference is that if the jury had found that he had been directed to engage in such work by his employer, and was injured while so engaged, his widow would be entitled to compensation for his death and would be foreclosed from suing at common law, even though her husband had engaged in covered employment only on rare occasions, for a short time only, and no premiums had been paid to the accident fund for his hours in covered employment. The right to compensation in such a case would be unrelated to normal ideas of insurance coverage after the payment of premiums, because of the administrative difficulty of bringing a person under the existing program when he spends only a few hours per year in covered employment.

In discussing some possible solutions to the problems raised by these cases, the author hastens to add that there are other questions of equal or greater importance arising from the Act which are beyond the scope of this comment. For instance, the right to compensation of persons hired to engage in covered work for a limited period of time has reached the Supreme Court in two recent cases.[31] The present case law denies compensation to persons hired to build a house or a boat for an employer not engaged in that business, even though the employer is engaged in another business which is covered.[32] These cases generally use the "employer's business" approach, and base the denial of compensation on the fact that the employee cannot qualify as a "workman" because he is not hired by an "employer" as defined by the Act.[33]

The clearest and best solution to the problems raised by the dual activity cases would be to extend the coverage of the act, presently applying only to "extrahazardous" work and occupations, to include the

[30] 41 Wn.2d 81, 85, 247 P.2d 233, 235 (1952)

[31] Craine v. Department of Labor and Industries, 19 Wn.2d 75, 141 P.2d 129 (1943), Nyland v. Department of Labor and Industries, 41 Wn.2d 511, 250 P.2d 551 (1952).

[32] See note 3 *supra*.

[33] See notes 6 and 7 *supra*. The independent contractor's right to compensation is also beyond the scope of this comment. See the dissenting opinion per Grady, J., in Craine v. Department of Labor and Industries, 19 Wn.2d 75, 141 P.2d 129 (1943). Also see Koreski v. Seattle Hardware Company, 17 Wn.2d 421, 135 P.2d 860 (1943) and Latimer v. Western Machinery Exchange, 40 Wn.2d 115, 241 P.2d 923 (1952) reversed on rehearing, 142 Wash. Dec. 693 (1953), regarding the right of a self-employed person who has elected not to come under the act to sue a covered employer at common law.

employees of all employers who hire a certain minimum number of employees. When the Washington act was originally enacted in 1911, there was substantial doubt as to the constitutionality of legislation by states which interfered with the relations between employer and employee. For this reason, the compulsory coverage of the act was limited to "extrahazardous" employments, and elective coverage was provided for all other work and occupations. In 1917, this fear of unconstitutionality proved unfounded,[84] and since that time only one state has adopted this limitation,[85] two have removed it,[86] and two others have modified their statutes so as to have general coverage in effect.[87] Compulsory coverage in Washington and eight other states is still limited to "extrahazardous" occupations.[88] An overwhelming number of states provide general coverage of employments, usually excluding only farm and domestic labor, casual employment and work not in the employer's trade or business, and employees in firms with less than a certain minimum number of employees.[89] While it may not be possible presently to bring Washington in line with most of the other states, it is submitted that the limitation of coverage to "extrahazardous" employments has long since outlived its usefulness, is responsible for confusion and uncertainty as to coverage, and should be abandoned in favor of more general coverage of businesses and occupations.

If the act should continue to be limited to "extrahazardous" businesses and occupations, still the statute should take a consistent and understandable approach to coverage. As already pointed out, the statute suggests the "employer's business" approach, while the cases make it clear that the "employee's activity" may bring an employee (and the employer, as to him) within the act. It is suggested that both approaches could be used together in determining coverage. Some businesses or industries can easily be established as units, and those intended to be included could be enumerated in the statute, and all employees engaged in the employment of such an industry could be brought within the compulsory provisions of the act. To increase certainty and more clearly accomplish the purpose of the act, the employee

[84] New York Central Ry. Co. v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).
[85] New Mexico.
[86] Arizona, New Hampshire.
[87] New York, Illinois; 1 LARSON, WORKMEN'S COMPENSATION § 55.10 (1952).
[88] Washington, RCW 51.12.010 [RRS § 7674a]; Kansas, Louisiana, Maryland, Montana, New Mexico, Oklahoma, Oregon, Wyoming, 1 LARSON, WORKMEN'S COMPENSATION § 55.10 (1952).
[89] 2 LARSON, WORKMEN'S COMPENSATION, Appendix A, Table 3 (1952).

should be entitled to compensation regardless of the nature of his work, and should be relieved of the requirement that he be engaged in work which is related to the hazards for which the industry or business is classified at the time of the injury.[40] The rules for determining the course or scope of employment are fairly well established, and coverage based on this suggestion would be much easier to define than if based on the scope of "extrahazardous" employment, which is the present criterion. The fundamental reasons for compensation coverage apply equally whether an employee is injured while operating a machine or sitting in a chair. The general rule in other states limiting coverage to "extrahazardous" employments is in accord with this suggestion, and the period of coverage would more nearly coincide with the period for which industrial insurance premiums are paid.[41]

In businesses which are not to be included as a unit because they are generally of a non-hazardous character, or not appropriate units for Workmen's Compensation coverage, but where some of the employees are engaged in occupations which should be included, the "employee activity" approach to coverage could be used to supplement the business coverage just suggested, and a comprehensive, authoritative list of included occupations could be set out by the statute. Here the "pin-point rule" should be retained, because its removal would create a problem equally as great with respect to dual activity as presently exists. For instance, if that rule were abandoned, the sales manager of an appliance store who only occasionally engages in covered employment would be automatically covered for all of his time, a result which would surprise both the employer, the employee and the Department of Labor and Industries. Where the employee's activity is the basis of coverage, the retention of the pin-point rule would actually enhance the certainty of coverage, because the scope of the employee's covered duties would be set out by the statute.[42]

In the fact situation suggested by *Muck v. Snohomish County PUD*,[43] where an employee only occasionally and infrequently engages

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[40] The Federal Employer's Liability Act, 35 STAT. 65 (1908) as amended 45 U.S.C. §§ 951-60, removed the pin-point rule by the 1939 amendment. Even in Washington, compensation is not denied because the injury was not caused by a hazard related to the employment. See note 21 *supra*.

[41] 1 LARSON, WORKMEN'S COMPENSATION § 55.33 (1952), RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 188-190 (1950).

[42] New York uses the employee's activity to determine coverage when the employer has less than four employees. Gramlich v. Board of Education, 297 N.Y. 349, 79 N.E. 2d. 437 (1948).

[43] See note 1 *supra*. The court held that the jury had found that Muck was not so engaged.

in covered work, the problem of the right to compensation becomes acute. The law gives workmen the right to compensation from the state accident fund automatically when they are injured in covered employment, regardless of the fact that the employer has not complied with the act and paid premiums for the employee's time. Compensation is not a gratuity from the state, but is paid from contributions by the employers who engage in covered work. This type of case is the hardest to reconcile with an insurance program, because of the administrative difficulty in collecting premiums for the employee's time. The workman should be covered by the Act, but when the employer has failed to comply with the Act, the cost of the injury must fall either on the rest of the employers in the class by an increased basic premium rate, or on the employer by way of penalties and increased cost experience. If he discontinues the employment of men engaged in covered work, he may be able to avoid the latter. To find the workman not entitled to compensation defeats the purposes of the Act, and raises the problem "when is an employee 'only occasionally' engaged in extrahazardous work?" Under the present system of coverage, it is probably better to find such an employee entitled to compensation if he is engaged in covered work in the course of his employment at the time of his injury.

It seems that in any event, so long as coverage is limited to "extrahazardous" employments, these dual capacity cases will continue to present difficult problems, both in fact and law, concerning coverage. The suggested changes are at best only stop-gap measures, to improve the position of the employee and his employer by making the right to compensation broader and more certain within the framework of the present limited coverage system. Only when coverage is extended to the employee's entire scope of employment will the problem of dual capacity be eliminated.[44] If Workmen's compensation is a desirable institution as an alternative to the evils of common law litigation between employer and employee, then a broadening of the statutes to cover more employees in more varied occupations for a greater portion (if not all) of their working time is also desirable to more nearly provide the "sure and certain relief for workmen, injured in extrahazardous work . . . regardless of questions of fault . . ." which is the primary objective of the act.[45]

[44] Except where the employee has two employers. *See, e.g.,* Lunday v. Department of Labor and Industries, 200 Wash. 620, 94 P.2d 744 (1939).

[45] RCW 51.04.010 [RRS § 7673].