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Workmen's Compensation

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same results might have been reached without the provision, its inclusion removes all doubt.[7]

Subsection 2 of the act saves to the plaintiff, or to the personal representative of a decedent, those causes of action for injuries caused by a wrongdoer who died simultaneously with or prior to their infliction. Without this, the cause of action would depend upon pure chance, which is a result supportable neither in reason nor justice;[8] its application will be particularly important in wrongful death by automobile cases, where both drivers are killed on impact. Under the former rule, since no cause of action arose during the lifetime of the tort feasor, none could survive his death; this provision preserves to the personal representative of each driver, for what it is worth, the cause of action under RCW 4.20.010.

The act specifically repeals the miscellaneous survival acts which preceded it: RCW 4.20.040, the general survival act whose place it takes; RCW 4.20.045, having to do with the death of a tort feasor, now fortunately beyond the need for discussion; a pair of sections from the probate code, RCW 11.48.100-110, providing actions by or against an estate for waste, trespass, conversion. A proviso saves to suitors all causes arising under the repealed statutes prior to their effective date of repeal.

Finally, it should be noted that this new act does not affect the operation of RCW 4.20.060, which provides for the survival for the benefit of the same group of beneficiaries who take under the wrongful death act "[an] action for a personal injury to any person occasioning his death. . . ." Absent a qualifying beneficiary, there is no survival, and of course by its terms the surviving cause can never exist independently of the action for wrongful death.

JOHN W. RICHARDS

WORKMEN'S COMPENSATION

The statutory language of the session laws of Title 51, RCW, is codified as title 51 by chapter 23.[1] This means, of course, that the language of this title is now the official language of the statute law, and reference to earlier session laws is unnecessary.

In addition to this legislation of general significance, specific statutes were enacted amending the Industrial Insurance Title in these ways:

[7] See 28 WASH. L. REV. 201-02 (1953).

[8] *Id.* at 203. This subsection is almost identical with that in the New York act, N.Y. DECD. EST. LAW § 118.

[1] Wash. Sess. Laws 1961, ch. 23.

First, most statutory award amounts for disabilities and pensions were increased.[2]

Second, the entitlement of present pensioners was increased.[3]

Third, provision was made for installment payment of partial disability awards.[4]

Fourth, provision for cross appeals was made.[5]

Fifth, certain modifications were made in the obligation of the state where third party suits are brought.[6]

Sixth, a definition of "acting in the course of the employment" was adopted.[7]

Seventh, specific statutory coverage was provided for the lunch hour period.[8]

Installment Payments of Permanent Partial Disability Awards. Most states pay workmen's compensation awards in installments, not in lump sums, in order that the worker and his dependents will be protected from temptations arising from sudden increases in wealth.[9] The compensation award, paid in installments, comes in periodically as a substitute for wages. The Washington statute, as amended in 1961, accords.

In most states, the amount of compensation is correlated to the average weekly wage, so that the amount of partial disability ties in with this figure. In Washington, there is no correlation between the weekly wage and the compensation award, thus the monthly amount must be determined on another basis, which is the amount of monthly entitlement for temporary total disability, except for the first month when $1,000 is payable.

In order to permit a disabled worker to have access to lump sum payments where circumstances warrant—i.e., to buy a new business, to pay off the mortgage, and the like—the department, in its wisdom, may permit commutation to a lump sum payment. This, too, accords with the attitudes taken in most states.[10]

Increases in Award Amounts. Presumably, the various increases in

[2] Wash. Sess. Laws 1961, ch. 274.
[3] Wash. Sess. Laws 1961, ch. 108.
[4] Wash. Sess. Laws 1961, ch. 274.
[5] *Ibid.*
[6] *Ibid.*
[7] Wash. Sess. Laws 1961, ch. 107.
[8] *Ibid.*
[9] 2 LARSON, WORKMEN'S COMPENSATION 528 (1952).
[10] 8 SCHNEIDER, WORKMEN'S COMPENSATION, §§ 1790-1865 (1951).

the amounts payable to workers and their dependents reflect the impact of secular inflation.

There appears to be an arithmetical inconsistency in the statute in that the loss of one leg at hip is compensated at $9,750, with the proviso that "for disability to a member not involving amputation, not more than nine-tenths of the foregoing respective specified sums shall be paid," which would seem to permit an award of $8,775, but the maximum permissible unspecified disability award is $8,750.[11]

The Lunch Hour Riddle. The amendment makes clear that contrary to prior decisions,[12] lunch hour injuries may be compensable if they occur at the jobsite, whether or not the worker is paid for the lunch period.

This provision is quite sweeping, and seems to extend coverage to any worker who happens to eat at his desk, lathe or other place of employment, even though he might conveniently have elected to eat elsewhere. In view of the fact that the Washington statute does not limit compensation to injuries which arise out of the employment, the coverage here can be quite broad indeed.

One might question whether this legislative declaration is totally consistent with the concept that certain employment situations are extra-hazardous, and only those are within the ambit of the industrial insurance statute. While eating lunch near busy streets may subject the worker to street risks, thus calling for compensation coverage of those risks, one would think that in most situations the circumstances making an employment extra-hazardous do not continue to operate during the luncheon break. This statutory amendment may presage eventual abolition of the extra-hazardous limitation of the basic statute.

Finally, most of the troublesome cases do not turn simply on the circumstance that the injury occurred during the lunch hour. For the most part, they have involved conduct which can be said to have taken the worker out of the course of his employment,[13] whether at lunch time or in the middle of a shift. If a worker at lunch elects to explore his place of employment and falls down a shaft where exploration is not a part of his assigned tasks, it is *what* he was doing, not *where* or *when* that may take him out of compensation coverage. The statute speaks only to the where and when, not to the what.

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[11] Wash. Sess. Laws 1961, ch. 274.

[12] Tipsword v. Dep't of Labor & Indus., 52 Wn.2d 79, 323 P.2d 9 (1958); Young v. Dep't of Labor & Indus., 200 Wash. 138, 93 P.2d 337 (1939).

[13] Young v. Dep't of Labor & Indus., *supra* note 12.

At the prompting of the Legislative Council, and perhaps by Judge Foster,[14] the legislature also addressed itself to the *what* question, defining what is meant by "in the course of employment."

"Acting in the Course of Employment" Defined. At one time, the supreme court had adopted a most stringent and restrictive definition of "in the course of employment."[15] The definition stated in the amending legislation parrots the language of the supreme court in *Gordon v. Arden Farms Co.*,[16] which rejected the previous narrowing construction. Specifically, it is not required that wages be paid for the period in which the injury occurs, or that the worker be actually engaged in doing the thing for which he was specifically hired. He will be covered while on the jobsite for periods when his conduct is incidental to the work he is employed to do.

The legislative enactment is contrary to the position taken by the supreme court in its opinion in *West v. Mount Vernon Sand & Gravel, Inc.*,[17] where a common law suit for negligence was permitted for injuries sustained by a worker a few minutes before his workshift began. Such an injury would be within the period of the course of employment under the new statutory definition, since it was "immediate to the actual time that the workman is engaged in the work process" and in an area controlled by the employer. The statutory language[18] specifically excludes the parking lot area from workmen's compensation coverage.

There will always be problems of interpretation of the fringes of coverage. The statute suggests that the worker is covered for "time spent going to and from work on the jobsite." One may ask, "How many times can a worker go home from work on any one day?" If this seems a nonsense question, consider the situation of Pauline Hackmann who left work and after having departed from the specific area where she worked, discovered that she had left her thermos. She returned to the cloak room, picked up the thermos, and on the way out of the building was injured in a fall when she slipped in brine. Compensation was denied to her, pursuant to the *West* case.[19] Under the new statute, no specific cut-off occurs when the shift ends, and probably

[14] See his concurring opinion in West v. Mount Vernon Sand & Gravel, Inc., 156 Wash. Dec. 727, 732, 355 P.2d 795, 799 (1960).
[15] Tipsword v. Dep't of Labor & Indus., 52 Wn.2d 79, 323 P.2d 9 (1958).
[16] 53 Wn.2d 41, 330 P.2d 561 (1958).
[17] 156 Wash. Dec. 727, 355 P.2d 795 (1960).
[18] Wash. Sess. Laws 1961, ch. 107, §3.
[19] *In re* Pauline Hackmann, Claim No. C-444424, Docket No. 9416 (Bd. Indus. Ins. App. 1960).

the wisdom of Solomon is required to decide whether Miss Hackmann was going home "from work" or merely "from picking up her thermos." The problem is foreseeably complicated by the circumstance that it may become necessary to decide the point at which she decided to return. If she reaches the outside world, or even the parking lot, and thereafter returns, it is conceivable that she has reached a point of no return from which she returns at her peril.

RICHARD COSWAY