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Workmen's Compensation Acts - Meaning of "Accident"

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tary Dist. of Chicago, 184 Ill. 597, 56 N.E. 953 (1900). Authority given in permissive language must be exercised where other persons have an absolute right to have it exercised. *Kelley* v. *Milwaukee,* 18 Wis. 83 (1864).

There is a division of authority as to the interpretation of "may" in statutes like that involved in the principal case. A New York statute authorizing inhabitants of a school district to provide for transportation of pupils, and providing that the trustees "may" contract for their conveyance, was held to be permissive and not mandatory. *In Re Board of Education of Union Free School Dist. No. 2 of Town of Brookhaven, Suffolk County,* 210 N.Y. Supp. 439 (1925). However, under a similar statute in South Dakota the court held "may" to mean "must" because public interest and individual rights call for the exercise of powers given. *Swenehart* v. *Strathman,* 12 S.D. 313, 81 N.W. 505 (1900); *State ex rel. Coolsaet* v. *City of Veblen,* 58 S.D. 451, 237 N.W. 555 (1931). Under an Illinois statute "may" was similarly construed. *People ex rel. Brokaw* v. *Commissioners of Highways,* 130 Ill. 482, 22 N.E. 596 (1889).

The Wisconsin statute authorizing the transportation of children to and from school, WIS. STAT. (1937) § 40.34, uses "may" when referring to the authority of the school district meeting, and "shall" when referring to the authority of the school board. The Attorney-General has indicated that under this statute mandamus will not lie to compel a school district to provide transportation for children living more than two and a half miles from school, on the ground that the statute makes adequate provision for their transportation when the district fails to provide it. 24 Atty. Gen. 652. The statute provides for the compensation of parents who furnish transportation for their children if the school district fails to transport them.

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Workmen's Compensation Acts—Meaning of "Accident."—Plaintiff alleged that he suffered an accident in the course of his employment. He had been employed by the defendant for more than a year at a machine that made building blocks composed of sand, ashes and cement. Sand and ashes often collected in the plaintiff's shoes. He claimed to have a small dark-pigmented mole above his little toe and that the sand and ashes entered this mole and caused an irritation which produced a melanoma. He underwent several operations, but he was denied compensation by the Workmen's Compensation bureau, which found that the condition was purely occupational and was not the result of an accident arising out of and in the course of employment. On appeal, *held,* judgment affirmed. Where no specific time can be fixed as the time when an accident occurred, there is no accident within the meaning of the Workmen's Compensation Act. *Ballinger* v. *Wagaraw Bldg. Supply Co.* (New Jersey, 1938) 200 Atl. 744.

The instant case is an illustration of the majority rule on the meaning of the term "accident." Where no specific time or occasion can be fixed as the time of the alleged accident there can be no "injury by accident" within the Workmen's Compensation Act. *Szalkowski* v. *C. S. Osborne & Co.,* 9 N.J. Mis. 538, 154 Atl. 611 (1931). An occurrence to constitute an "accident" within the meaning of the Workmen's Compensation Act must be traceable to a definite time, place, and cause and must have been unexpected. *Prouse* v. *The Industrial Commission of Colorado,* 69 Colo. 382, 29 P. (2d) 625 (1921). Where incapacity results from the natural and gradual wearing away of physical capacity or con-

dition during regular and usual employment, there is no injury for which recovery may be had under the Workmen's Compensation Act. But, where an employee is engaged in the performance of his regular duties and is subjected to extraordinary strain, or other unusual condition distinctive in character and definite as to time and place, resulting in injury, such injury is "accidental." *Esmonde* v. *Lima Locomotive Works,* 51 Ohio App. 454, 1 N.E. (2d) 633 (1937). Accordingly, where disability of an employee arises from continual breathing of iron dust in his occupation, and there is no incident or time to which he can point as the beginning of such disability, it cannot be held to arise out of an "accidental injury," but is an occupational disease and is not compensable. *Peru Plow & Wheel Co.* v. *Industrial Commission,* 311 Ill. 216, 142 N.E. 546 (1924).

Workmen's Compensation Act allowing compensation for injuries by accident does not cover injuries to the muscles and nerves through too long a continuance at a task which is too heavy for an employee, where there is no sudden or violent event producing at the time the injury to the physical structure of the body. *Your* v. *Melrose Granite Co.,* 153 Minn. 512, 189 N.W. 426, 29 A.L.R. 506 (1922). Thus, an employee engaged in handling cases of milk, who over a long period of time developed an abdominal ailment resulting from the repeated contact of the cases with his body was held not to have sustained an injury within the Workmen's Compensation Act. *Industrial Commission of Ohio* v. *Borchert,* 49 Ohio App. 5, 194 N.E. 881 (1935). Similarly, swelling and soreness of feet caused by standing in oil was held not to be an accidental injury for which compensation could be awarded. *Imperial Refining Co.* v. *Buck,* 155 Okla. 25, 7 P. (2d) 909 (1932). *Contra,* it was held there is an accident within the compensation law, although the injury is the cumulative effect of continuous pressing against the gear shift lever of a truck made necessary because of worn gears and repeated striking of the knee by the gear shift lever. *Aldrich* v. *Dole,* 43 Idaho 30, 249 Pac. 87 (1926).

An employee who became infected with tularaemia while dressing rabbits, by reason of pre-existing abrasion on his finger, was held to be injured by accident with the Workmen's Compensation Act. *Great Atlantic & Pacific Tea Co.* v. *Sexton,* 242 Ky. 266, 46 S.W. (2d) 37 (1932). It was held that where a physical condition of the claimant arises which is induced by an unusual and excessive exposure—he had received an unusual amount of foreign substance in his eye while working in a road contractor's repair shop—at a time reasonably definite, such condition is unexpected and occasioned by "accident," so as to constitute "accidental injury" within the meaning of the Workmen's Compensation Act. *Hallenbeck* v. *Butler,* 101 Colo. 486, 74 P. (2d) 708 (1938).

Massachusetts does not require that an injury be traceable to a definite time and source to be an accident. Thus, where an employee had suffered a strain but had not been incapacitated until five months later, and during the interval had sustained at least two more strains apparently as serious as the first, the court held that under the compensation act an injury to be compensable need not be caused by some definite accident and the injury may be found to have arisen out of and in the course of employment, although it cannot be shown to have originated in any definite accident or at any definite time. *Case of Crowley,* 287 Mass. 367, 191 N.E. 668 (1934).

Under the Workmen's Compensation Act of Wisconsin liability of an employer exists "Where the employee sustains an injury." WIS. STATS. (1937) § 102.03(2). The word "accidental" as used in compensation laws denotes something unusual, unexpected, undesigned. The nature of it implies that there was

an external act or occurrence which cause the personal injury. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. *Vennen* v. *New Dells Lumber Co.*, 161 Wis. 370, 154 N.W 531 (1915).

The word "accident" should be taken in a broad sense. It includes a violent and undue straining of the muscles caused by lifting concrete blocks weighing 80 lbs. apiece, resulting in a bodily hurt—in this case a muscular spasm, without external evidence of injury—to an employee from physical overexertion in performing his work. *Byrstrom Bros.* v. *Jacobson*, 162 Wis. 180, 155 N.W. 919 (1916). An employee engaged in outdoor work during extremely cold weather who has received an injury from accidentally freezing while so engaged is entitled to compensation. Liability attaches where the injury to the employee results from a hazard incidental to the industry. *Eagle River Bldg. & Supply Co.* v. *Industrial Commission of Wisconsin*, 199 Wis. 192, 225 N.W. 600 (1929). Where it appeared that the deceased had gone three or four steps up a stairway during his working hours and after taking a shower, as he was allowed to do, had a heart attack and fell, fracturing his skull, the evidence warranted the finding of the commission that he "accidentally" sustained personal injury resulting in his death while in the plaintiff's employ and "performing service growing out of and incidental to his employment." *Milwaukee Electric Railway & Light Co.* v. *Industrial Commission of Wisconsin*, 212 Wis. 227, 247 N.W. 841 (1933).

Where an employee, suffering from arteriosclerosis, sustained a rupture of an artery while pulling a heavily loaded truck up an incline, it was held an accident within the meaning of the statute. *Malleable Iron Range Co.* v. *Industrial Commission of Wisconsin*, 215 Wis. 560, 255 N.W. 123 (1934). But, an employee of advanced age, required by his employment to stand during most of his working hours, who during all of the time of said employment, was suffering from arteriosclerosis in the lower limbs, and from diabetes, and whose feet broke out so that he could never walk again, did not sustain a compensable injury. His disability was not an accident since there was nothing but the fact that he was employed and ultimately broke down, and that the ordinary wear and tear of his work may have had some slight tendency to accelerate disability. *Schmitt* v. *Industrial Commission of Wisconsin*, 224 Wis. 531, 272 N.W. 486 (1937).

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