Workmen's Compensation—Assault by Striker—Injury Arising Out of and in the Course of His Employment.

An employee, who is assaulted by a striker while approaching the plant of his employer on his return from his meal for which he had been sent by his foreman on account of working an extra shift, is entitled to compensation, as it is an injury arising out of and in the course of his employment.

Helena, Montana, March 27, 1917.

Industrial Accident Board,
Helena, Montana.

Gentlemen:

You have submitted to me your files in connection with an injury received by Walter Tilton, employe of the Royal Milling Co., of Great Falls. It appears that on the 6th day of January, 1917, the employe worked a full shift, beginning at 3 P. M., and ending at 11:30 P. M., and that he had agreed to work the shift of another employe, begin-

ning at 11:30 P. M. and ending at 8 A. M. January 7th. It further appears that there was a strike at the plant of the Royal Milling Co., and that the head miller who had arranged with the employe to work this extra shift, stated that he would arrange for a meal to be brought out to the mill for Mr. Tilton. A little later the head miller instructed Mr. Tilton to go to the town for the purpose of securing and bringing back to the mill his meal. That this employe left at about ten o'clock, came down town to secure the meal and returned by street car. It also appears that Mr. Tilton got off the street car at the point nearest to the mill, and while approaching the premises of the Royal Milling Co., he was assaulted by some strikers, knocked unconscious and severely beaten.

It appears that the Royal Milling Co. is subject to the provisions of Compensation Plan No. 2.

It is contended by the Insurance Company that the accident "did not arise out of" the employment, for the reason that the assault took place apparently off the property of the Royal Milling Co., and that a strike being in progress at the time of this assault, this man had not been employed by the Company to guard their property, but was employed in the mill.

The question which is presented is whether or not this was "an injury arising out of and in the course of his employment," within the meaning of Section 16 of the Workmen's Compensation Act.

> "To warrant a recovery, it must appear that death was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment. Even though the injury arose out of and in the course of the employment, if it be not an 'accident' within the purview of the act, there can be no recovery. Even though there be an accident which occurred 'in the course of' the employment, if it did not arise 'out of the employment there can be no recovery; and even though there be an accident which arose 'out of the employment,' if it did not arise 'in the course of the employment,' there can be no recovery. Fitzgerald v. Clarke & Son (1908) 2 K. B. 796; Craske v. Wigan (1909) 2 K. B. 635."
>
> Bryant v. Fissell, 84 N. J. Law 72, 86 Atl. at 459-60, 3 N. C. C. A. 585.

The question of whether or not an injury is an accident within the Act is a mixed one of law and fact. As was said in the N. J. case just cited, within the purview of the Act, an accident is an unlooked for mishap or untoward event, which is not expected or designated. The distinction between the words "out of", and "in the course of" is expressed in this N. J. case as follows:

> "For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. As was said by Buckley, L. J., in Fitzgerald v. Clarke & Son (1908) 2 K. B. 796, 77 L. J. K. B. 1018: **'The words 'out of' point, I think to the origin and cause of the accident;** the words 'in the course of', to the time, place and circumstances under which the accident takes place.

> The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by **the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."**

I do not believe it can be seriously contended that the injury received by Mr. Tilton was not in the course of his employment, inasmuch as the assault took place during his regular hours of employment, and he was then acting under instructions from the head miller in going down town for his meal and in returning to the mill. It was said in the case of Heldmier v. Cobbs (Ill.) 62 N. E. at 855-6:

> "Because he ceased work for one hour to rest and eat his dinner, he did not cease to be in the employ of the defendant any more than one employed to work by the week or month, ceases to be in the employ of the employer during the time he takes his meals."

The only question then is whether or not this assault "arose out of" his employment.

In the case of Re McNichol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, it was held that an injury to an employe while performing the duties assigned to him, by assault of a fellow servant who is permitted to continue his services while intoxicated, in which condition he is, to the knowledge of the employer, quarrelsome and dangerous, arises "out of and in the course of" the employment, within the meaning of the Workmen's Compensation Act. In this opinion, the Massachusetts Supreme Court says:

> "It is sufficient to say that an injury is received 'in the course of the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have its origin in a risk connected with

the employment, and t ohave flowed from that source as a rational consequence."

It was held in the case of Western Indemnity Co. v. Pillsbury (Cal.), 151 Pac. at 406:

> "The circumstances that the injury was the result of a wilful or criminal assault by another, does not exclude the possibility that the injury was caused by accident * * * It is clear that an injury caused by a third person may be accidental, so far as the injured person is concerned."

This case was cited and followed in Western Metal Supply Co. v. Pillsbury (Cal.) 156 Pac. 496, where it was said:

> "It is agreed that because the shot was the wilful act of a third person, the killing was not accidental. This contention cannot be sustained. In Western Indemnity Co. v. Pillsbury, supra, we upheld an award for injuries received by an employe through the wilful assault of a fellow workman. That decision establishes the proposition that an injury may be accidental, even though it be intentionally inflicted by a third person."

It makes no difference that the assault upon the employe in this case was made by men who were strikers, and who at that time were not in the employ of the Royal Milling Co. In Hulley v. Moosbiurger, 87 N. J. Law, 103, 93 Atl. 79, in which case an employe received injuries through the playful attack of another employe, the Court says:

> "The principal to be extracted from the adjudicated cases in this state appears to be that, where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment * * * It is a matter of no consequence whether or not the workman, at the time he made the attack, was acting within the scope of his employment."

This case was cited and followed in Walther v. American Paper Company (N. J.) 98 Atl. 264.

In the English case of Nisbit v. Rayne, et al, 2 K. B. 689, 3 N. C. C. A. 268, it was held that the murder and robbery of a cashier while traveling in a railway carriage with a large sum of money for the payment of his employer's workmen, is an accident from the standpoint of the person murdered, and arising out of his employment.

In view of the foregoing, I am of the opinion that the assault upon Mr. Tilton was an injury arising out of and in the course of his employment. It was a risk reasonably incident to his employment. Mr. Tilton was assaulted, not because of any malice toward him personally, but because he was in the employ of the Royal Milling Co. at the time of a strike. This assault was not foreseen or expected, but it appears to have had its origin in a risk connected with his employment, and although the injury was intentionally inflicted by a third person, yet it was an accident as far as the injured employe was concerned, and

I am, therefore, of the opinion that the Insurance Company should pay compensation under the Act.

Respectfully,
S. C. FORD,
Attorney General.