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Workmen's Compensation

Peter J. Wiebe Jr.

VIII. WORKMEN'S COMPENSATION

A. COLORADO NOW EMPHASIZES THE RELATIVE NATURE OF THE CLAIMANT'S AND EMPLOYER'S WORK RATHER THAN THE EMPLOYER'S CONTROL OF THE CLAIMANT IN DISTINGUISHING BETWEEN INDEPENDENT CONTRACTOR AND EMPLOYEE.

In *Brush Hay and Milling Company v. Small*,[1] an order by the Industrial Commission denying workmen's compensation benefits on the ground that claimant was not an employee was set aside by the trial court, which found that claimant was an employee. The supreme court reversed, agreeing with the Commission that claimant was not an employee within the meaning of the Workmen's Compensation Act.[2]

Claimant was an electrician, and also operated a store and performed services for the general public. On occasion claimant sold equipment to defendant, always at cost plus 10%, and performed services for defendant, when required, for $3 per hour, which was remitted after the completion of each job. Claimant was employed by defendant only when defendant's employees were unable to handle the particular electrical work involved, which was once or twice a month, for jobs lasting from two or three hours to two or three days. Defendant's business was hauling and grinding feed; when injured, the claimant was helping defendant's employees remove an electric pump which was sold to defendant by claimant.

The problem faced by the court was deciding whether claimant was an employee or an independent contractor. In making the distinction the court discussed two tests, the first one being the "control test." The court's analysis of this approach was basically the same as has previously been used in Colorado.[3] The control test, employed by most courts,[4] includes, among others, the following elements: the *right* to control the details of the work, method of payment, who furnishes tools or equipment, and right of termination

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[1] 388 P.2d 84 (Colo. 1963).

[2] COLO. REV. STAT. §§ 81-1-1 to 81-17-7 (1963).

[3] 388 P.2d 84. See Industrial Comm'n v. Hammond, 77 Colo. 414, 236 Pac. 1006 (1925). The quotation by the court in the *Brush Hay* case is, in part, as follows:

> Each case must be decided on its own facts. . . . Among the factors *more or less* controlling are: Does the workman give all or only a part of his time to the work? . . . Has the laborer or employee control of the details? Which may employ, control, and discharge assistants? Which furnishes the necessary tools and equipment? May either terminate the employment without liability to the others? . . . Of these the most important . . . is the right of either to terminate the relation without liability. Where such right exists, the workman is usually a servant. Where it does not exist, he is usually a contractor. 388 P.2d at 87.

[4] Note, *The Employment Relation in Workmen's Compensation and Employer's Liability* Legislation, 10 U.C.L.A.L. REV. 161, 169 (1962).

of the relation.[5] If the employer furnishes tools, controls details, pays wages at regular intervals, and may fire without liability for breach of contract, the employer-employee relation is indicated. Colorado cases have previously emphasized the right of termination of the relation element, deeming it decisive,[6] and equating it to control so as to establish a master-servant relationship.[7] Prior to *Brush,* the control test was the test used in Colorado to determine whether there was an employee-employer relation for workmen's compensation purposes.

The second test discussed in *Brush,*[8] and most heavily relied on by the court in this case, is the "relative nature of the work" test. Prof. Larson prefers this formula,[9] and it has recently been adopted by several other courts.[10]

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[5] 1 LARSON, WORKMEN'S COMPENSATION LAW 843, 53 (1952); 99 C.J.S. *Workmen's Compensation* § 92 (1958); Note, *supra* note 4, at 169, n. 30, citing RESTATEMENT (SECOND), AGENCY § 220. Some recent cases applying the control test are: Scott v. Rhyan, 78 Ariz. 80, 275 P.2d 891 (1954); State Compensation Ins. Fund v. Industrial Acc. Comm'n, 124 Cal. App. 2d 1, 268 P.2d 40, 42 (1954) where the court said: "the test of what constitutes independent service lies in the control exercise."; Graf v. Montgomery Ward & Co., 234 Minn. 485, 49 N.W.2d 797 (1951) where the court said that:

> in determining whether the relationship is one of employee or independent contractor, the most important factor is the right of the employer to control the means and manner of performance. Other factors to be considered are mode of payment, furnishing of materials or tools, control of the premises . . . and the right of the employer to discharge the employee. 49 N.W.2d 801.

Klein v. Sunrise Bldg. Co., 7 App. Div. 2d 805, 180 N.Y.S.2d 885 (1958), the court deeming both the control test and the "so-called relative nature of the work test" (180 N.Y.S.2d at 887) principal factors in making the distinction; and Seals v. Zollo, 205 Tenn. 463, 327 S.W.2d 41 (1959) where the right to control was deemed the primary consideration in making the employee-independent contractor distinction.

[6] Industrial Comm'n v. State Compensation Ins. Fund, 122 Colo. 721, 220 P.2d 721 (1950); Industrial Comm'n v. Moynihan, 94 Colo. 438, 32 P.2d 802 (1934), which held that "Nothing in the terms of claimant's employment precluded either party from terminating the relation without liability, and that is the controlling element." (94 Colo. at 442); Industrial Comm'n v. Hammond, 77 Colo. 414, 236 Pac. 1006 (1925).

[7] Industrial Comm'n v. Valley Chip & Supply Co., 133 Colo. 258, 293 P.2d 972 (1956); Industrial Comm'n v. Bonfils, 78 Colo. 306, 241 Pac. 735 (1928), which said, "By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work." (241 Pac. at 736); LARSON, *op. cit. supra* note 5, at § 44.35.

[8] Brush Hay and Milling Co. v. Small, 154 Colo. ___, 388 P.2d 84, 87 (1963).

[9] LARSON, *op. cit. supra* note 5, at § 43.50.

[10] Boyd v. Crosby Lumber and Mfg. Co., 166 So. 2d 106 (Miss. 1964), where the court held that, "there are two tests to be considered in analyzing an employee-independent contractor question: (1) the control test; and (2) the relative nature of the work test." (166 So. 2d at 110). The court, in applying both tests, came to the conclusion that the exercise of control by employer (in spite of contract to the contrary) and the fact that claimant was an integral part of employer's business, thus having no independent business of his own, meant that claimant was an employee within the workmen's compensation laws of Mississippi; Paly v. Lane Brush Co., 6 App. Div. 2d 50, 174 N.S.S.2d 205 (1958), where both tests were used; Parkinson v. Industrial Commission, 110 Utah 309, 172 P.2d 136 (1946) where the relative nature test was not discussed as such, but emphasis was placed on diversity of employer's and claimant's business and the claimant's independence (172 P.2d at 141).

The essence of this test, as proposed by Larson,[11] is the relativity of the character of the claimant's work or business and the character of the employer's business. Considerations used in applying this test are, on one hand, the skill required of the employee and the separate nature of his work from the nature of the employer's, and on the other hand, factors relating to the character of the employer's business are whether the employee's work is a regular part of the employer's business, how continuous it is, and its duration.[12] The greater the requirement of skill and the more separate the occupations, the stronger is the indication of an independent contractor relation; continuous, regular, and extended use of the claimant's services indicates an employer-employee relationship for workmen's compensation purposes.

The control test is similar to the test used in the common law of torts for distinguishing between employee and independent contractor,[13] where the relevance of the distinction is whether or not the employer is vicariously liable for the torts of a servant. The relative nature test, however, has been suggested by Larson for use in connection with workmen's compensation,[14] the purpose of which is to compensate the employee for injuries suffered by him, and to pass the burden of such compensation to the consumer as a cost of business.

The court, in applying the tests, relied most heavily upon the relative nature test. The court said:

> . . . we attach significance to the following:
> 1. The nature of the service rendered . . . and its lack of any close relationship with the business of Brush Hay. 2. Small rendered services to Brush Hay for only a comparatively small part of his total work month. 3. Small was "called in" . . . to do a "given task" and not for general employment . . . . 4. Because of his superior knowledge . . . Small controlled the details of his services. 5. Small . . . performed . . . by the use of his own tools . . . . 6. Only when the particular task was completed would Small bill Brush Hay with Brush Hay then remitting in full . . . .[16]

The first three considerations employed by the court are part of the relative nature test, the latter three are elements of the control

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[11] LARSON, *op. cit. supra* note 5, at § 43.52.

[12] *Ibid.* Also see cases cited in 99 C.J.S. *Workmen's Compensation* § 94 (1958). These cases are cited for use of the criteria proposed by Larson as elements of the relative nature of the work test.

[13] SEAVEY, LAW OF AGENCY § 84 (1964); RESTATEMENT (SECOND), AGENCY § 220 (1958); LARSON, *op. cit. supra* note 5, at § 43.42.

[14] LARSON, *op. cit. supra* note 5, at § 43.41.

[15] *Id.* at §§ 43.42, 43.51.

[16] Brush Hay and Milling Co. v. Small, 388 P.2d 84, 87 to 88 (Colo. 1963).

approach. Has the application of both tests achieved a result consistent with the Colorado Workmen's Compensation Act?

The Workmen's Compensation Act is to be liberally construed.[17] Liberal construction of the Act would include extending its coverage; broadening the definition of employee would be an extension of coverage. The supreme court's previous use of the control test, particularly emphasizing the right to terminate, was a narrow application of the act in comparison with the broadened view adopted in the principal case. The court, in using both tests, has achieved a highly liberal interpretation of the act without overruling its previous decisions.

In applying both tests, the court has fallen in line with those cases which have applied the relative nature test.[18] The use of this test is consistent with the purpose of the workmen's compensation laws, which is to provide remedies where otherwise none might exist.[19]

B. A Claimant Who Is Killed Or Injured While Working For His Employer For Less Than The Usual Wage Rate Is Entitled To Compensation Based On His Usual Wages.

In *State Compensation Insurance Fund v. Coleman*,[20] an award for death of an employee was allowed by the Industrial Commission, affirmed by the district court, and, on writ of error brought by the Insurance Fund, was affirmed by the supreme court. The pertinent facts as stipulated were that claimant's husband was an employee at the date of his death, was employed as an electrician at $3.88 per hour, and was killed in an accident "arising out of and within the course of his employment."[21] When the accident occurred, deceased was on a weekend trip to pick up equipment belonging to his employer. It was agreed that he was to receive expenses but not wages for making the trip, in accordance with the

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[17] Rogers, Inc. v. Fishman, 388 P.2d 755 (Colo. 1964); Idarado Min. Co. v. Barnes, 148 Colo. 166, 365 P.2d 36 (1961); State Compensation Ins. Fund v. Howington, 133 Colo. 583, 298 P.2d 963 (1926).

[18] See White Top and Safeway Cab. Co. v. Wright, 171 So. 2d 510 (Miss. 1965); cases cited in note 10, *supra;* and Note, 10 U.C.L.A.L. Rev. 161, 174 (1962).

[19] The Supreme Court of the United States has indicated that "employee," when used in social legislation such as the National Labor Relations Act and the Social Security Act, should be defined in accordance with elimination of the form which the laws were passed to avoid. The court felt that the common law definition of employee as used in master-servant law was inadequate. United States v. Silk, 331 U.S. 704 (1947); N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944).

[20] 392 P.2d 598 (Colo. 1964).

[21] *Id.* at 599.

practice regarding similar trips made by deceased on behalf of his employer.

The Fund contended that deceased was performing a contract for hire separate from his normal employment; and that the contract failed to provide for wages, so that compensation should have been computed on the basis of a $10.00 per week minimum.[22]

In holding as justified the referee's conclusion that no separate contract existed,[23] the court analogized the facts of the case to the situation where an employee is injured en route to work or while on a coffee break. Injuries occurring at such times have been held compensable as arising out of and within the course of employment[24] and therefore, the court reasoned, decedent's death was compensable. Here, however, it was stipulated that decedent's death arose out of the course of his employment; the real question was *which* employment the decedent was engaged in at the time of the accident. The only discussion given by the court concerning the existence of another contract of employment was as follows: ". . . but having stipulated that there was one employer, that the accident arose out of and during the course of the employment, that deceased drew wages of $155.20 per week . . . it is somewhat difficult to vizualize [*sic*] the deceased as employed on another job with no wages."[25] The possibility of duality of employment

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[22] COLO. REV. STAT. § 81-11-3 (1963).

[23] *Id.* at 600.

[24] The injuries occurring in these circumstances, however, must still have been connected with the claimant's duties as an employee, as when one uses his own car to perform a specific mission for an employer. Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 391 P.2d 677 (Colo. 1964) (A claimant who was "killing time" before contacting his employer for work was not injured within his duties as employee.); General Plant Protection Corp. v. Industrial Comm'n, 146 Colo. 191, 361 P.2d 138 (1961), which held that a director of advertising films, who was out of state on location, and was killed while crossing the highway to his motel from a restaurant, and who had declared he was going to work on the script at his motel was killed as a result of hazards arising from and incident to his employment; Alexander Film Co. v. Industrial Comm'n, 136 Colo. 486, 319 P.2d 1074 (1957). See also O. P. Skaggs Co. v. Nixon, 101 Colo. 203, 72 P.2d 1102 (1937); Wells v. Cutter, 90 Colo. 111, 6 P.2d 459 (1931).

Larson says: "while admittedly the employment in the course of the journey between his home and the factory, it is generally taken for granted that workmen's compensation was not intended to protect him against all perils of that journey." LARSON, *op. cit. supra* note 5, at § 15.11. Injuries while journeying may be compensable if the journey is itself part of employee's work (*Id.* at § 16), is made in employer's vehicle (*Id.* at § 17), or the injury occurs while the employee is making a trip for his own as well as employer's purpose, when someone else would have had to perform the work if the employee had not (*Id.* at § 18.21). In this connection, Colorado has held that one who was allowed but not required to take work home with him, and who had in fact taken work home with him, and was injured going to work the next day, was not injured on a trip which was incident to his employment, and therefore received no compensation. Industrial Comm'n v. Anderson, 69 Colo. 147, 169 Pac. 135 (1917).

[25] State Compensation Ins. Fund v. Coleman, 392 P.2d at 600 (Colo. 1964).

under a separate contract with the same employer was not discussed; the essence of the opinion was a mere holding that the stipulation that the injury arose out of the course of the employment was justified.

The court, although failing to state adequate reasoning, achieved the correct result in deciding that the accident causing decedent's death arose out of and in the decedent's employment *as an electrician.* When an employee suffers an accident while performing a task not ordinarily within the course of his employment, but which is done at the command of the employer,[26] or done by the employee to enhance his value as such to his employer,[27] it is usually held that the accident arose out of and in the course of the claimant's normal employment. In the *Coleman* case, deceased made the trip at the instance of his employer, and it is probable that his reason for making the trip without wages was connected with his employment as an electrician. The opinion in the principal case, however, fails to apply any rules of law which determine whether or not a separate contract of employment exists. The court did distinguish the facts of the *Coleman* case from the situation where there are two employers for whom separate kinds of work are being performed.[28] This is like distinguishing black from white, however,

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[26] Industrial Comm'n v. Stebbins, 102 Colo. 136, 78 P.2d 368 (1938), allowed recovery when, at his boss's orders, a construction foreman was checking on the night watchman, and was killed in an automobile accident when he and wife were driving to the town where the watchman resided. In Electric Mut. Liab. Ins. Co. v. Industrial Comm'n, 391 P.2d 677, 679 (Colo. 1965), the court noted that, "It has been held that where an employee uses his own car, as here, to perform services for or at the direction of his employer he remains in the course of his employment until he returns home." See also Bundy v. Petroleum Products Co., 103 Kan. 40, 172 Pac. 1020, 1021 (1918), where it was held that:

> [A] workman who has been engaged for a specific employment at a fixed amount may recover from his employer compensation, based upon the earnings of persons in that grade of service, for an injury received while working for less wages in a different grade to which he had been assigned.

Teldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1953); Howell v. Kingston Tp. School Dist., 106 Pa. Super 89, 161 Atl. 559 (1932); and Krier v. Dick's Linoleum Shop, 78 S.D. 116, 98 N.W.2d 486 (1959).

[27] "Where, however, the nature of the employee's act was known to and acquiesced in by the employer and tended to prepare the employee for advancement in line with the employer's custom, it may be held to have arisen out of the employment." Annot. 123 A.L.R. 1176 (1939). The issue before the Colorado court was in the course of *what* employment did the accident happen. The court held that in fact there was only one employment. In the following cases it was held that the accident arose out of or in the course of the original, basic employment, although it might not have been contended that there were several contracts of employment: see Williams v. Central Flying Service, Inc., 236 Ark. 709, 368 S.W.2d 87 (1963); Chicago, Wilmington & Franklin Coal Co. v. Industrial Comm'n., 303 Ill. 540, 135 N.E. 784 (1922) (where a trapper who wanted to be a driver was driving at the time of the compensable accident in order to gain experience for his upcoming promotion to driver, and such was customary); Morningstor v. Corning Bakery Co., 6 App. Div.2d 128, 176 N.Y.S.2d 388 (1958).

and is not helpful in establishing legal standards for deciding a case with different facts.

C. LOSS OF BOTH CORRECTED AND UNCORRECTED VISION IS NOW COMPENSABLE IN COLORADO.

In *Rogers, Inc., v. Fishman,*[29] the supreme court on writ of error affirmed a judgment of the district court which had approved an award by the Industrial Commission allowing compensation for loss of corrected vision. Claimant, before the injury, had almost no vision in his left eye, until correction made it normal. Before the accident, claimant's right eye was nearly blind, and the accident caused the loss of all corrected vision in the left eye. After the loss of vision of the right eye was sustained, normal vision was restored in the right eye by corrective surgery.

The court held that an injury causing the loss of corrected vision is compensable under the Colorado Workmen's Compensation Act. The contention of the Fund, that the employer should not be charged with a corrected loss because the employer is required to pay for uncorrected losses without receiving credit for correction,[30] was rejected by the court by distinguishing the principal case as a different kind of case from cases which established that rule.[31] The court then said that liberal interpretation of the Workmen's Compensation Act required the holding that loss of vision meant loss of corrected as well as uncorrected vision.[32]

The decision and reasoning of the court is consistent with that

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[28] State Compensation Ins. Fund v. Coleman, 392 P.2d 598, 600 (Colo. 1964).

[29] 388 P.2d 755 (Colo. 1964).

[30] However, this rule had been followed in Colorado in Great American Indem. Co. v. Industrial Comm'n, 114 Colo. 91, 162 P.2d 413 (1945); and in Jewell Collieries Corp. v. Kenda, 110 Colo. 394, 134 P.2d 206 (1943). The court cited these cases and distinguished them. The reasons which have been advanced for the failure to take correction into account are that the remedial purpose of the Workmen's Compensation Act would be defeated by such a method of compensation, as restoration of sight by means of glasses does not eliminate the handicap for which compensation is supposed to be provided. (Great American Indemnity Co. v. Industrial Comm'n, *supra*).

Other jurisdictions, however, are not in agreement on the question; those computing the correction contend that it is unrealistic to fail to take into account the value of eyeglasses in removing the handicaps caused by reduction of vision. For a discussion of those cases, see Annot. 142 A.L.R. 822 at 832 (1943), and annotations thereby supplemented. Note, *Workmen's Compensation — Eye Injuries and Loss of Vision,* 35 N.C.L. REV. 443 (1957) contains a discussion of the rules in the various jurisdictions.

[31] 388 P.2d 755, 756 (Colo. 1964).

[32] *Ibid.* Many of the workmen's compensation cases in Colorado espouse and reaffirm the rule that the Workmen's Compensation Act is to be liberally construed in awarding remedies thereunder. See cases cited in note 17, *supra.*

in cases decided in other jurisdictions,[33] and does not conflict with other Colorado cases dealing with loss of vision within workmen's compensation law.[34] The rule accepted in Colorado, that the Workmen's Compensation Act is to be liberally construed, should readily be applied to all cases involving loss of vision, since loss of vision handicaps one's industrial usefulness more severely than almost any other single injury. Liberal allowance of claims for loss of vision

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[33] "[A]ccording to most authorities, the extent of impairment of vision will be determined in view of the use of glasses . . . the extent of loss of vision due to an injury may be computed on the basis of the pre-injury vision as corrected by glasses."

58 AM.JUR. *Workmen's Compensation* § 290 (1948). An analysis of some of the authorities so holding reveals the liberality which prevails in making awards for loss of vision. In Illinois, the fact that there is no statutory provision regarding the basis of computation of loss of vision, the fact that the purpose of workmen's compensation is to compensate for financial loss to the employee due to reduction of his industrial value, and the fact that corrected vision has industrial value required a holding that compensation should be based on loss of corrected vision. Lambers v. Industrial Commission, 411 Ill. 593, 104 N.E.2d 789 (1952). Since the purpose of the Iowa Workmen's Compensation Act is to reimburse the employee for injuries suffered, it is not fair to omit the pre-injury correction of vision in computing the extent of the loss. Whitney v. Rural Independent School Dist. No. 4, 232 Iowa 61, 4 N.W.2d 394 (1942). In Nebraska, a victim is compensated to the full extent of his industrial loss caused by an industrial accident. The court recognized that one having partial vision may have high industrial value, but has none when blind, and held that when one loses his sight, compensation is not based on normal vision. Ames v. Sanitay Dist., 140 Neb. 879, 2 N.W.2d 530 (1942). Corrected vision is as valuable as normal vision and its loss should be compensated in order to fulfill the liberal ends of the North Carolina workmen's compensation laws, when there has been total loss of vision. Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938). This case is discussed in Comment, *Eye Injuries and Loss of Vision,* 35 N.C.L. REV. 443 (1957), which recommends that computation on the basis of corrected vision not be limited to total blindness situations, but should be based on corrected vision both before and after the accident. *Id.* at 448.

In Reigle v. Sholly, 140 Pa. Super. 153, 14 A.2d 166 (1940) the court allowed compensation for loss of a blind eye that could have been restored to sight through an operation. The Virginia court imputed to the drawers of the Virginia Workmen's Compensation Act the common knowledge that corrected vision has industrial value, and thereupon held that, since no provision was included in the act, corrected rather than uncorrected vision should be used as the basis for compensation. Walsh Const. Co. v. London, 195 Va. 810, 80 S.E.2d 524 (1954).

There is scant contrary authority, which is discussed in Comment, 35 N.C.L. REV. 443, *supra,* and in Comment, 28 NOTRE DAME LAW. 152 (1952). It is interesting to note that Shrum v. Catawba Upholstering Co., *supra,* held that corrected vision prior to accident was not used as a basis for computation of extent of loss when complete blindness was not occasioned by the accident. However, cases which have held that awards for loss of vision should be computed without consideration of the effects of correction are cases in which vision was corrected after, but not before, the accident. Allesandro Petrillo Co. v. Marioni, 33 Del. 99, 131 Atl. 164 (1925); Shaw v. Rosenthal, 112 Ind. App. 468, 42 N.E.2d 383 (1942); Parrott Motor Co. v. Jolls, 168 Okla. 96, 31 P.2d 925 (1934); Pocahontas Fuel Co. v. Workmen's Compensation Appeal Board, 118 W.Va. 565, 191 S.E. 49 (1937).

[34] Colorado has been liberal in awarding compensation for loss of vision. As stated in note 33, *supra,* post-accident correction of vision is not used as a basis for making the awards. In Downs v. Industrial Comm'n, 109 Colo. 12, 121 P.2d 489 (1942) which was cited by the court in the *Fishman* case (388 P.2d at 756), a claimant suffered the enucleation of an eye the vision of which had previously been seriously impaired, and was allowed the full amount for loss of an eye. When, after an accident, an injured employee may distinguish large objects and shadows, he is nevertheless entitled to compensation for total disability. Industrial Comm'n v. State Ins. Compensation Fund, 71 Colo. 107, 203 Pac. 215 (1922). A holding contra to the rule of the *Fishman* case would not be consistent with the humanitarian, protective, and beneficient purposes of the Workmen's Compensation Act.

would also be justified on the ground that only 104 weeks' wages are allowed for the blindness of an eye,[35] an award which seems quite meager in view of its value to its owner and the exclusiveness of workmen's compensation as a remedy.

D. THERE IS NO RECOVERY FOR INJURIES CAUSED BY RECREATIONAL ACTIVITIES UNLESS THE ACTIVITIES ARE REQUIRED BY OR BENEFIT THE EMPLOYER.

The Colorado Supreme Court, in *Murphey v. Marquez,*[36] reversed the decision of the district court which had approved an award made by the Industrial Commission. The claimant's husband had been accidentally killed by a blast from a shotgun which he was removing from the roof of a building upon which he had been working as a roofer. The shotgun belonged to the foreman, who had brought it for the employees' use in shooting pigeons on their own time, and at the time of the accident decedent was removing the gun on the foreman's orders. The gun was neither needed nor used in connection with the roofing business.

The court reasoned that the injury was not within the course of employment because injuries occurring during recreational activities are compensable only when: [Quoting from LARSON, *op. cit. supra* note 5, at § 22]

> (a) They occur on the premises during a . . . recreation period as a regular incident of the employment; or (b) The employer, by . . . requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (c) The employer derives substantial direct benefit . . . beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation . . . .[37]

In denying recovery, the court said there were no facts forming a basis for application of these tests, and that any findings of the Commission which could have justified their application were not supported by the evidence.[38]

There is some Colorado authority concerning the compensability of injuries occasioned by recreational activities. A discussion of cases concerning injuries while participating in athletic activities is found in *Lindsay v. Public Service Co. of Colo.*[39] (cited by the court in the instant case),[40] which strictly applied the "benefit to

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[35] COLO. REV. STAT. § 81-12-4 (1) (hh) (1963).

[36] 393 P.2d 553 (Colo. 1964).

[37] *Id.* at 556.

[38] *Ibid.*

[39] 146 Colo. 579, 362 P.2d 497 (1961).

[40] Murphey v. Marquez, 393 P.2d 553 (Colo. 1964).

employer" test as stated by Larson and adopted by the court, requiring actual direct benefit to the employer from the recreation. Other Colorado cases do not indicate a liberal allowance of compensation for injuries occurring during recreation where firearms are involved.[41]

There is no single test which is uniformly applied by courts in other jurisdictions in determining the compensability of injuries received during recreation. Usually, however, the injury must have happened as a result of an activity beneficial to the employer, or must have occurred on the premises as a result of a normal practice incident to the employment.[42] The decision of the court in the principal case was in line with holdings of other jurisdictions and prior Colorado decisions, if the assumption made by the court, that the accident occurred during a strictly recreational activity, was correct. Shooting pigeons while on the job certainly does not benefit the employer, nor is it the type of recreation which regularly occurs as an incident of the roofing business.

There are facts, however, which would have justified a holding that the deceased was not engaged in a recreational activity at the time of the accident, but that he was doing an act arising out of his employment. The gun was being removed on the foreman's orders and was an act necessary to ending the day's work; furthermore, the accident happened while the deceased was on the premises where he had been ordered to work by the employer. Other courts, in liberally construing workmen's compensation laws, have considered

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[41] In Security State Bank of Sterling v. Propst, 99 Colo. 67, 59 P.2d 798 (1936), an employee, a cashier at defendant bank, who, with the knowledge of the bank, carried a pistol, shot himself while depositing a letter on his way to work. At this time, the employee was bringing some out-of-town deposits with him as was his usual practice. The death of employee was held compensable on the grounds that he was doing something incidental to his work, with the knowledge and the acquiescence of the bank. However, where an employee killed himself with a rifle which he was carrying in order to shoot animals for dog food, and the rifle wasn't used in connection with his duties as a deputy water commissioner, the court denied compensation stating that the accident did not arise out of the course of his employment. State Compensation Ins. Fund v. Russell, 105 Colo. 274, 96 P.2d 846 (1939). When a policeman was shot at a non-obligatory "turkey shoot," which he had participated in at the encouragement of his employer, the supreme court refused to allow a deviation from the Commission's finding that the injury did not arise out of the claimant's employment. Industrial Comm'n v. Day, 107 Colo. 332, 111 P.2d 1061 (1941). It is apparent that a substantial benefit must be received by the employer, or that the work of the claimant must directly involve the handling of firearms, before the court will deem a gunshot accident as one arising in or out of the course of employment.

[42] Comment, *Workmen's Compensation: Recreation of Employees*, 15 OKLA. L. REV. 102, 105 (1962); Annot. 115 A.L.R. 992 (1938). In the case of Colsow v. Steele, 73 Idaho 348, 252 P.2d 1049 (1953), an employee was injured by a shot from the pistol of a fellow employee. The foreman knew it was customary for the employee to use the pistol for target pactice and did not object. The court reasoned that the injury arose out of a risk customarily encountered by the employee at the location where his employer required him to be, and was therefore compensable under a liberal construction of the workmen's compensation laws.

such circumstances in awarding compensation for gunshot injuries.[43] The court in the *Marquez* case should perhaps have given some consideration to the possibility that the deceased was doing an act which was disconnected with prior recreational use of the gun, so that a liberal interpretation of the Workmen's Compensation Act could have resulted in the allowance of an award.

E. DEATH FROM A CAUSE LISTED AS AN OCCUPATIONAL DISEASE MAY BE COMPENSABLE UNDER THE COLORADO WORKMEN'S COMPENSATION ACT.

The supreme court, in *Colorado Fuel & Iron Corp. v. Industrial Commission*,[44] affirmed the district court's approval of an award of workmen's compensation death benefits made by the Industrial Commission. The decedent was suddenly killed by carbon monoxide poisoning when he entered a confined area to perform a physical task. Death by carbon monoxide poisoning is listed as an occupational disease under the Occupational Disease Disability Act[45] (ODDA) and recovery under this act is exclusive.[46]

The court correctly rejected the contention of the employer that the inclusion of carbon monoxide poisoning as a compensable disease within the ODDA meant that a death by carbon monoxide poisoning was compensable only under the ODDA, even when the circumstances causing the death were such as to constitute an accident within the Workmen's Compensation Act. Instead, the court

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[43] In Joe Ready's Shell Station & Cafe v. Ready, 218 Miss. 80, 65 So. 2d 268 (1953), the cout held that a gunshot injury arose out of claimant's employment when claimant, who did bookkeeping work at her home, was injured while removing a shotgun from the couch on which she sat while doing her work. The presence of the gun was deemed a risk to which claimant was exposed as a result of her employment, reasoning that in removing the gun claimant did an act in furtherance of the work which she had been hired to do. The court found claimant's home to be the "employment premises." Recovery was allowed a claimant who was shot by a shotgun that was used in part for sport, and in part for protection. When shot, claimant was performing his regular duties. The court said that claimant's possession of the gun as a pastime was not material when he was shot while actually performing his regular duties as an employee. Gallaher v. United States Fid. & Guar. Co., 77 S.W.2d 312 (Tex. Civ. App. 1934). Where a construction worker who was searching for a route along which to construct a road through a timbered area was shot by a deer-hunter, the court held the risk to be incident to his employment and allowed compensation. Arnested v. McNicholas, 223 Mich. 488, 194 N.W. 514 (1923). In Boyce v. Burleigh, 112 Neb. 509, 199 N.W. 785 (1924), claimant was shot accidentally by a fellow employee who was handling his employer's shotgun against express instructions. The court awarded compensation because claimant was shot while performing work while on the employer's premises.

[44] 392 P.2d 174 (Colo. 1964).

[45] COLO. REV. STAT. § 81-18-9 (17) (1963).

[46] COLO. REV. STAT. § 81-18-8 (1963).

discussed the definitions of "occupational disease"[47] and "accident"[48] as previously formulated by Colorado, and re-affirmed the view that an occupational disease is one which is slowly contracted as an incident of the type of work done by decedent, and that an accident is an occurrence happening at a definite time and place from a definite cause.[49] In holding that the mere inclusion of the medical cause of decedent's death as a compensable disease within the ODDA did not preclude recovery under the Workmen's Compensation Act in a proper case, the supreme court adopted the general rule applied by other jurisdictions.[50]

Peter J. Wiebe, Jr.

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[47] Industrial Comm'n v. Ule, 97 Colo. 253, 48 P.2d 803 (1935); COLO. REV. STAT. § 81-18-10(1)(a) (1963).

[48] Prouse v. Industrial Comm'n, 69 Colo. 382, 194 Pac. 625 (1921) was the only case cited by the court, but there are others: See *e.g.,* Hallenbeck v. Butler, 101 Colo. 486, 74 P.2d 708 (1937); Peer v. Industrial Comm'n, 94 Colo. 227, 29 P.2d 636 (1934). When an employee was killed because of a sudden and excessive inhalation of gases (which gases were normally inhaled in moderate amounts), the court in United States Title & Guar. Co. v. Industrial Comm'n, 76 Colo. 241, 230 Pac. 624 (1924), deemed the death of the employee compensable, saying the opposite conclusion would obtain if the death were a result of the accumulated effects of the deceased's daily breathing of the gases. When this case was decided, however, Colorado had no ccupational disability disease act; the act was passed in 1945. Colo. Session Laws. 1945, Ch. 163, at 432.

[49] Colorado Fuel & Iron Corp. v. Industrial Comm'n, 392 P.2d 174, 179 (Colo. 1964).

[50] "[A] disease constitutes an accident within the meaning of the Act if it is traceable to a definite time and place." Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600, 603 (1961); Sullivan's Case, 265 Mass. 497, 164 N.E. 457 (1929). In Industrial Comm'n v. Roth, 98 Ohio St. 34, 120 N.E. 172 (1918), the court deemed an accidental inhalation of fumes an accident rather than an occupational disease. In New York, a disease is a compensable accident within its workmen's compensation laws when its inception is traceable to a single act, definite in time, and is catastrophic. Lerner v. Rump Bros., 241 N.Y. 153, 149 N.E. 334 (1925). In LARSON, *op. cit. supra* note 5, at 37:30, it is said:

> It is generally agreed . . . that any disease is compensable which follows as a natural consequence of an injury which qualified independently as accidental. . . . The second type of clear case is that in which the disease is the direct result of some identifiable mishap. . . . In such cases . . . compensation is almost invariably awarded without any serious hesitation because of the fact that the injury takes the form of "disease."

For a general discussion of cases holding the inhalation of gases accidental injuries rather than occupational diseases, see Annot. 90 ALR 619 (1934).