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Louisiana Workers Compensation

Chapter 6

Arising out of and in the Course of Employment

For an injury caused by an accident to be compensable under a workers' compensation system, the accident must "arise out of employment" and occur "in the course of employment."[1] "Arising out of employment" concerns the nature of the risk to which the employee was exposed at the time of the accident. An injury is not compensable unless it can be related to an employment risk. "Course of employment" concerns time, place and activity. In other words, when did the accident happen and, at that time, where was the employee and what was the employee doing?

Although an accident must both arise out of and occur in the course of employment, the two requirements are interrelated. A strong showing of one of the requirements may overcome a weak showing of the other. As discussed below, when an employee is squarely in the course of employment, i.e., on the employer's premises during work hours performing job duties, almost any risk will be considered to be an employment risk. When the employee is less squarely in the course of employment, however, the risk must be more clearly related to employment to be compensable under the Louisiana Workers' Compensation Act.

[1] "Arising Out of Employment" is often referred to the "scope" of employment. Thus, the less cumbersome phrase "course and scope of employment" is often used in the place of "arising out of and "in the course of" employment."

Arising Out of Employment

In Louisiana, the "arising out of employment" requirement is analyzed under one of two tests, depending on the circumstances of the accident and injury. The test used most often is the "positional risk" test. Under the positional risk test, any risk is an employment risk if the employee is exposed to that risk while performing job duties at work during working hours. The second test, the "increased risk" test, requires that the employee show that the employee had greater exposure to the risk because of employment. In Louisiana, the increased risk test applies either (1) by statute,[2] or (2) when the employee is not squarely in the course of employment.

Positional Risk

Under the positional risk test, a neutral risk or a personal risk is still considered an employment risk if the employee encountered that risk while squarely in the course of employment. For example, in Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, (La. 2/2/42), 6 So.2d 747, an employee was working in his employer's hull house when the hull house was hit and destroyed by a tornado. The hull house collapsed, and the employee was killed. The appellate court had held that the tornado was not an employment risk and, therefore, that the accident did not arise out of employment. According to the appellate court, the accident did not arise out employment because the employee's employment did not expose him to any greater risk of harm from the tornado than the general public was exposed. The Louisiana Supreme Court, however, disagreed. Rejecting any consideration of the original source of the risk, the tornado, the court found the employee's "death was due to the fact that his employment necessitated that he be at the place where the accident occurred and that, therefore, giving the compensation act the liberal interpretation to which it is entitled, the accident arose out of, and was incident to the employment."

Harvey is an example of how an ostensibly neutral risk can be considered an employment risk if the employee is exposed to that risk while at work. A risk personal to the employee may also be considered an employment risk if an accident occurs while the employee is at work. In Morris v. City of Opelousas, 89-633 (La. App. 3 Cir. 12/12/90), the court, following well established precedent, held that injuries sustained in a fall caused by an employee's epileptic seizure arose out employment. The court noted that the fall arose out of employment because the employee was on the employer's premises performing tasks incident to his employment at the time of the fall. That the fall may have been precipitated by a personal risk, an epileptic seizure, was of no consequence. The court explained that the "accident was not the epileptic attack which may have caused him to fall. The accident was the fall itself." The employee fell while squarely in the course of his employment, and, therefore, the fall arose out of his employment.

[2] As discussed more fully in other chapters, heart related, perivascular and mental injuries require an increased risk, as defined in the statute, to be compensable. La. R.S. 23:1021(8)(b), (c), (d) and (e).

Increased Risk

When an employee is not squarely in the course of employment at the time of an accident, the accident will not be compensable unless the employee can show that employment increased the employee's risk of injury. An accident caused by a neutral or personal risk, which would be compensable if the employee were squarely in the course of employment, generally would not be compensable if the accident occurred away from work, before or after work hours, while the employee was not engaged in work activities.

In Mundy v. Department of Health and Human Resources, 595 So. 2d 346 (La. 1/17/92). the plaintiff worked as a nurse for Charity Hospital. On the date of the accident, the plaintiff arrived at the hospital and proceeded to the elevator to take it to the eleventh floor where she was scheduled to work the night shift. A stranger entered the elevator with her. When the elevator stopped and the doors opened on the second floor, the man started stabbing Mundy. Mundy eventually pushed her assailant out of the elevator onto second floor. Mundy then proceeded to her work station on the eleventh floor, where she received medical care.

Instead of filing a workers' compensation action, Mundy filed a tort action based on the alleged negligence of her employer. Her employer argued that her exclusive remedy was workers' compensation. The trial court, however, found that "plaintiff 'had not come under the control or supervision of Charity Hospital at the time when the incident occurred," and therefore, she was not in the course and scope of her employment at the time of her injury.

The trial court's decision was eventually reviewed and affirmed by the Louisiana Supreme Court. The Supreme Court found that the employee was not in the course and scope of her employment because she "was attacked before she arrived at her work station and before she began her employment duties. Although she had entered the building in which her work station was located, she was in the public area of the building open to the public, on an elevator used by patients and visitors as well as employees."

The fact that the employee was seeking tort damages, rather than workers' compensation benefits should not, but probably did, influence the result in Mundy. If the employee had sought workers' compensation benefits, would the court have denied those benefits because, although on her employer's premises, she had not reached her work station at the time of the attack? If instead of being attacked in the elevator, the employee had fallen in the elevator as a result of an epileptic seizure, would the court have denied her workers' compensation benefits for injuries that she sustained in the fall?

Contrast Mundy with Mitchell v. Brookshire Grocery Company., 26,755 (La. 2 Cir. 4/5/95), 633 So.2d 202. In Mitchell, the employee was a cashier at a grocery store. She completed her shift, clocked out and then made a purchase at the store. Walking to her car after making the purchase, she fell in a pot hole in the parking lot and was injured. The trial court, relying on Mundy, found that the accident did not arise out of employment and, therefore, denied workers' compensation benefits. The appellate court reversed and awarded benefits. Although the general public was exposed to the defect in the employer's parking lot, it was still an employment risk because Mitchell's employment required her to encounter the defect more frequently than the

general public. The court distinguished the defect in an employer's premises, which is peculiar and distinctive to that location, from the "independent, random act of violence by an unknown third party" in Mundy.

Course of Employment

When an employee is performing job duties at work during work hours, the employee is clearly within the course of employment. Course of employment becomes less clear when the employee is not performing job duties, is away from the employer's premises, or, although on the employer's premises, has not yet begun or has already finished working. The employee is considered to be in the course of employment for a "reasonable" time before and after work hours. If the employer requires the employee to participate in an activity outside of work hours or away from the employer's premises, or if the employer derives substantial, direct benefit from such an activity, the employee will be considered in the course of employment. What is a "reasonable" amount of time to be at work before or after work hours? When is participation in an activity required instead of voluntary? When does an employer "directly and substantially" benefit from an employee's activity away from work? These are all factual questions to be determined on a case-by-case basis.

Courts have developed the following general rules regarding employees that are not squarely in the course of employment:

Travel to and from Work

Travel to and from work generally is not in the course of employment. This sometimes called the "going and coming rule." There are, however, exceptions to this rule. Travel to and from work is considered to be in the course of employment under the following circumstances:

(1) If the employer interested itself in the travel by paying the employee for travel time, providing a company car or reimbursing the employee for the cost of the travel.

(2) If the employee is on a mission for the employer. *Note*: When the employee is on an employment mission, the employee is in the course of employment from "portal-to-portal," meaning from home to the location of the mission or, alternatively, from the location of the mission to home. McLin v. Indus. Specialty Contractors, Inc., 2002-1539 (La. 7/3/03), 851 So.2d 1135.

(3) If the accident happens on the employer's premises.

(4) If the employee is injured traveling from one work site to the next.

(5) If the employee was doing work for his employer under circumstances where the employer's consent could be fairly implied.

(6) If the operation of a motor vehicle was the performance of one of the duties of the employment of the employee

(7) If the employee was injured in an area immediately adjacent to his place of employment and that area contained a distinct travel risk to the employee, also known as the "threshold doctrine."

The threshold doctrine usually applies to inherently dangerous conditions, like railroad tracks adjacent to an employer's premises, where employees are forced to walk across the tracks to reach the employer's premises. Some cases, however, have held that any dangerous condition that an employee encounters in the vicinity of employer's premises, even a neighborhood with a high crime rate, can fall within the "threshold doctrine. " For example, in Hall v. House, Golden, Kingsmill & Ross, 97-988 (La. 5 Cir. 5/27/98), 717 So.2d 250, a lawyer that worked in an office building in New Orleans left work at the end of the day and walked two blocks to a lot where his car was parked. At the parking lot, two men car jacked him. Later, they murdered him. The court held that, under the threshold doctrine, the lawyer was in the course of his employment when he was abducted because he had to have a car for work, had to park in the vicinity of the office building and all of the parking lots around the office building were in "an extremely high crime area."

In Robinson v. Brown, 35,430 (La. App. 2d Cir. 12/19/01), 803 So. 2d 396, the court found that the "threshold doctrine" did not apply to a temporary weather condition that was not peculiar to the employer's premises. The employee went to work during an ice storm and found a note on the office door stating that the office would be closed for the day. After she left the building and was walking to the parking lot where her car was parked, she slipped on a patch of ice and injured her back. At the time of accident, she was crossing a public street. The court rejected a "threshold doctrine" argument, finding that the ice storm reached the area the day before the alleged fall and that the icy condition existed over most of the area and was not unique to an area in which the employee was required to traverse to and from her place of employment.

Accidents While Working Out of Town

Louisiana courts apply an expansive interpretation of what constitutes employment activity when an employee is required to be out of town for business. In Robinson v. Simmons Co., 99-1319 (La. App. 4th Cir. 3/22/00), 762 So2d 112, the employee was traveling from Louisiana to Wisconsin on a sales trip. Instead of flying directly to Wisconsin, however, he flew into Chicago. The employee was shot and killed while in Chicago. He was scheduled to be in Wisconsin for a sales meeting the morning after he was killed. His reason for going to Chicago was never established, but he did have family, friends and a residence in the area. When his body was found, he was wearing business attire, and he had work materials in his car. The employer argued that Robinson's death was not compensable because had no business reason to stop in Chicago and, therefore, that any stop in Chicago was a personal deviation. The court noted, however, that, due to the nature of the occupation, general rules regarding travel do not necessarily apply to traveling sales persons. Absent compelling evidence of a purely personal deviation, an injury that occurs while an employee is on a sales trip occurs in the course of employment.

Deviation from Employment Mission

In Walker v. Acadian Builders of Gonzales, Inc., 99 0297 (La. App. 1 Cir. 5/19/00), 797 So.2d 690, after completing his job duties for the day, the decedent jumped into a pond adjacent to the worksite and drowned. The accident occurred while the employee was waiting for employer provided transportation to leave the job site. The court found that the decedent was not in the course of employment because the decedent was not actively engaged in employment activities at the time of the accident and the accident occurred at a place not contemplated by employment activities. The court further found that the accident did not arise out of employment because the risk associated with drowning in a pond was not incidental to the decedent's employment. Would the result have been the same if, instead of drowning, the employee had been struck by lightning?

See, also Robinson v. F. Strauss & Son. Inc., 481 So.2d 592 (La. 1986) (denial of compensation affirmed when "course of employment" showing was weak because employee had deviated from employment task to attempt reconciliation with a neighbor who was jealous over the employee's attention to the neighbor's girlfriend, and the neighbor's shooting of the employee provided a weak "arising out of employment" showing).

Activity Done at the Employer's Instruction

When (1) an employer requests that an employee perform a job or errand outside of the employer's regular business, (2) during regular working hours, (3) while being paid by the regular employer, and (4) the employee is injured while performing that job or errand, the employee's injury arises out of the employee's regular employment. Hebert v. CIGNA, 637 So. 2d 1221 (La. App. 3 Cir. 5/25/94). In Hebert, the employee was employed by a lease and welding service as a roustabout. Occasionally, the owner of the lease and welding service had the employee perform personal tasks for him, including working at his cattle farm. On the day of the accident, the owner told the employee's supervisor to have the employee round up a calf that had gotten loose on the cattle farm, and the supervisor instructed the employee to perform the task. While attempting to lasso the calf on horseback, the employee was thrown from the horse that he was riding. The horse fell onto the employee, and he was rendered a paraplegic.

The trial and appellate courts agreed that the claimant was in the course and scope of his employment with the lease and welding service at the time of the accident on the owner's cattle farm. The appellate court noted that, "when an employee is following the direct order of a person in authority to perform a task outside of his normal employment duties for the benefit of his employer or of the superior, and is injured in the course of that work, the injury is usually compensable."[3]

See also, Freeman v. Brown's Furniture of Bunkie, Inc., 527 So.2d 544 (La. App. 3rd Cir. 1988), in which the court found a furniture store employee to be in the course of employment with the furniture store even though he was injured preforming services at his supervisor's side business, at a firework stand, not the furniture store. The court found that the "services plaintiff performed for [his supervisor] were a *requirement* of his employment," and, therefore, he was

[3] Citing Vicknair v. Southern Farm Bureau Casualty Ins. Co., 292 So.2d 747, 749-50 (La. App. 4th Cir. 1974).

entitled to workers' compensation benefits from the furniture store for the injuries he sustained working for the fireworks stand. 527 So. 2d at 547 (*Emphasis added*).

Statutory Exclusion from "Course and Scope of Employment"

In response to decisions that the Louisiana legislature found too lenient in finding the "course and scope of employment" requirements to be satisfied, La. R.S. 1031 was amended effective January 1, 1990, to exclude personal disputes and horseplay from compensable claims.

> La. R.S. 23:1031(D). An injury by accident shall not be considered as having arisen out of the employment and is thereby not covered by the provisions of this Chapter if the injured employee was engaged in horseplay at the time of the injury.
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> La. R.S. 23:1031(D). An injury by accident should not be considered as having arisen out of the employment and thereby not covered by the provisions of this Chapter if the employer can establish that the injury arose out of a dispute with another person or employee over matters unrelated to the injured employee's employment.

If a dispute between employees arose out of employment matters, injuries sustained as a result of the dispute may be compensable.[4] In Jackson v. Quikrete Products, Inc., 2001-1181 (La. App. 4 Cir. 4/17/02), 816 So.2d 338, a "night lead man" and a member of his crew did not like each other. One night, the night lead man gave instructions to the crew, but his adversary told the crew that they didn't have to do what the night lead man told them to do. A shouting match ensured that included the night lead man making derogatory comments about his adversary's mother. That, naturally, led to fist fight. The employer argued that, because the night lead man talked about his adversary's mother, the dispute was personal. The court, however, noted that the altercation originated from a dispute about the night lead man's instructions to the crew. Therefore, the dispute was related to employment and compensable under the Louisiana Workers' Compensation Act.

[4] The next chapter, on Affirmative Defenses, will discuss a statutory exception for the initial aggressor in an unprovoked physical altercation.