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the majority interpretation of *availability*, makes this provision more flexible to the needs of the workers, provides for minority claimants' free exercise of their religious and moral beliefs and affirms the policy of the Commission to require availability for suitable work only.

Had the court not applied the concept of suitability to the meaning of availability, a contrary result would probably have been reached or if the same result had been reached, it would have been an exception⁹⁷ to the general interpretations. In considering this case it is important to remember that here, unlike the *Swenson* case, *supra*, which the court cited and approved, the claimant had removed herself from 95% of the labor market by being available for first shift work only when the custom in the local labor market was to hire new employees for second and third shifts only. Ordinarily these factors would have necessitated a finding of unavailability; however, the court was not faced with this issue since their initial finding was that the work was not suitable for the claimant.⁹⁸

Having adopted this view the court should experience no difficulty in following the *Tary* case, *supra*, if given a similar set of facts, nor should it encounter any difficulty in holding that religious reasons constitute good cause for voluntarily leaving employment.

This case constitutes a liberal interpretation of the North Carolina Employment Security Law and a realistic judicial recognition of facts which cause claimants to restrict their employability. It should enable the North Carolina courts to give the Law a broad and liberal construction to aid in "mitigating the economic evils of unemployment."⁹⁹

THOMAS P. WALKER.

Workmen's Compensation—Death of Nightwatchman as Arising Out of and in the Course of Employment

In a proceeding under the Georgia Workmen's Compensation Act the evidence showed that a nightwatchman was murdered while drinking coffee in a drive-in 25 feet from the premises of his employer and 100 yards from the building he was required to watch. The murder occurred about 4:00 A.M., which was during the hours of his employment. The employer had not given him permission to leave the premises but had given him permission to drink coffee on the premises. Compensation was allowed on the grounds that the injury arose by accident out of and in the course of the employment.¹ This is typical of some of the

⁹⁷ *ALTMAN, AVAILABILITY FOR WORK*, 180 (1950).

⁹⁸ But See 12 Ben. Ser. no. 7, 13545-N. C. R (1949); 7 Ben. Ser. no. 12, 9007-N. C. A (1944).

⁹⁹ *Unemp. Comp. Comm. v. J. M. Willis Barber & Beauty Shop*, 219 N. C. 709, 15 S. E. 2d 4 (1941).

¹ *U. S. Fidelity & Guaranty Co. v. Croft*, — Ga. App. —, 91 S. E. 2d 110 (1955).

difficult cases that are presented before workmen's compensation boards throughout the country, and it illustrates the difficulty of construing the rather nebulous phrase "arising out of and in the course of the employment," which appears in the law of almost every state as a condition precedent to the right to receive compensation for injury arising by accident.²

From the genesis of the act as we know it today—in Germany in 1884—through the first State enactment in Wisconsin in 1911, to the time of the last state enactment in Mississippi in 1948 the underlying motive has been elimination of the burdensome common law remedies with which the industrial worker had to contend, and to bring about a quick and efficient means of recovery for their injuries. It was, therefore, evident from the beginning that acts must be liberally construed so as to effectuate their purpose.³ However, as Professor Horovitch in his book has aptly put it, ". . . the shades of Abinger and Shaw still dictate decisions through the dogged hands of judges steeped in ancient learning. In the *minority* of courts common law principles, long outworn, are brought back to deny recovery in present-day compensation actions."⁴

It is evident that by the nature of the act and the wording of this all important phrase there can be no hard and fast rules of law, and each decision will have to rest on its particular fact situation.⁵ As a consequence there has been a lack of unity among the states and even within individual states. The courts have gradually adopted general rules or standards to apply to the many and varying fact situations that arise, as in street accidents,⁶ meal time accidents,⁷ and accidents of traveling employees.⁸

Regardless of their type of work, employees must establish the existence of three definite requisites before being allowed recovery,⁹ *i.e.*, (1) that claimant suffered a personal injury by accident; (2) that such injury

² HOROVITCH, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 72 (1944). The North Carolina provisions are N. C. GEN. STAT. §§ 97-2(f), 3 (1929).

³ *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 85 S. E. 2d 596 (1955); *Essick v. Lexington*, 232 N. C. 200, 60 S. E. 2d 106 (1950); *Graham v. Wall*, 220 N. C. 84, 16 S. E. 2d 691 (1941); *Johnson v. Asheville Hosiery Co.*, 199 N. C. 38, 153 S. E. 591 (1930).

⁴ HOROVITCH, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* viii (1944).

⁵ *Harden v. Thomasville Furniture Co.*, 199 N. C. 733, 735, 155 S. E. 728, 730 (1930).

⁶ Note, 27 WASH. U. L. Q. 139 (1941); Annot., 80 A. L. R. 126 (1932).

⁷ Note, 17 N. C. L. REV. 458 (1939). ⁸ Note, 23 N. C. L. REV. 159 (1945).

⁹ *Henry v. A. C. Lawrence Leather Co.*, 231 N. C. 477, 57 S. E. 2d 760 (1950).

When the death is by violent means there is a rebuttable presumption of death by accident. *McGill v. Lumberton*, 215 N. C. 752, 3 S. E. 2d 324 (1939). The claimant's proof can consist of attending circumstances, as when the unexplained death is a natural and probable result of a risk of the employment. *Poteete v. North State Pyrophyllite Co.*, 240 N. C. 561, 82 S. E. 2d 693 (1954).

arose in the course of the employment; (3) and that such injury arose out of the employment.¹⁰

An accident within the meaning of the act is "an unlooked for and untoward event which is not expected or designed by the injured employee."¹¹ An assault is an accident within this definition when it is without design on the workman's part even though intentionally caused by another.¹²

"Arising out of" and "in the course of" are not synonymous and involve two ideas and two conditions, both of which must be proved by the employee. "Arising out of" refers to the origin or cause of the accident, as springing from the work the employee is supposed to perform, while "in the course of" refers to the time, place and circumstance under which the injury by accident occurred.¹³ An injury therefore can occur in the course of one's employment but not arise out of it, as when a nightwatchman is injured while washing his car on the employer's premises.¹⁴

The Georgia court applied these generalities in the principal case in affirming the Board's award of compensation. The court based its decision on an earlier Georgia case where it was said: "It has been held that acts of ministration by a servant unto himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, or while seeking shelter from a storm during working hours, where the employee intends to return to work after the storm passes, and numerous others, readily conceivable, performance of which while at work is reasonably necessary to his health and comfort, are incidents of his employment and acts of service therein . . . though in a sense they are personal to himself and only remotely and indirectly conducive to the object of his employment; and that an accidental injury sustained in the performance of such an act is compensable as one incurred in the course of the employment and resulting therefrom."¹⁵ The court stated that since the

¹⁰ *Anderson v. Northwestern Motor Co.*, 233 N. C. 372, 64 S. E. 2d 265 (1951); *Withers v. Black*, 230 N. C. 428, 53 S. E. 2d 668 (1949); *Taylor v. Wake Forest*, 228 N. C. 346, 45 S. E. 2d 387 (1947); *Wilson v. Mooresville*, 222 N. C. 283, 22 S. E. 2d 907 (1942).

¹¹ *Gabriel v. Newton*, 227 N. C. 314, 316, 42 S. E. 2d 96, 97 (1947); *Brown v. Carolina Aluminum Co.*, 224 N. C. 766, 767, 32 S. E. 2d 320, 322 (1949). The act does not contemplate recovery for all injuries, but only those by accident arising out of and in the course of the employment. *Bryan v. Loving Co.*, 222 N. C. 724, 24 S. E. 2d 751 (1943).

¹² *Withers v. Black*, 230 N. C. 428, 53 S. E. 2d 668 (1949); *Geltman v. Reliable Linen Supply Co.*, 128 N. J. L. 443, 25 A. 2d 894 (1942) (motorist assaulted by another motorist); *Finkerton Nat. Detective Agency v. Walker*, 157 Ga. 548, 122 S. E. 202 (1924).

¹³ *Lewter v. Abercrombie Enterprises, Inc.*, 240 N. C. 399, 82 S. E. 2d 410 (1954); *Sweatt v. Rutherford County Board of Education*, 237 N. C. 653, 75 S. E. 2d 738 (1953); *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. 2d 680 (1952).

¹⁴ *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. 2d 680 (1952).

¹⁵ *Carter v. Metropolitan Life Ins. Co.*, 47 Ga. App. 367, 368, 170 S. E. 535, 536 (1933).

watchman did not tarry long he was still in the course of his employment; and since it is a common hazard of a nightwatchman's job that he be set upon by robbers or burglars, it arose out of the employment. A contributing factor was that the deceased could survey most of the building from where he was sitting in the drive-in.

This seems to be an extreme case in that it allows recovery by an employee whose duty is to guard his employer's property, but who has completely left the premises of his employer and is attacked by someone who, so far as appears, had no intention of trespassing on the employer's property. However, the decision is commendable from a policy viewpoint, because it broadly interprets the key words of the act and more nearly effectuates its desired purposes.¹⁶ There was a dissent on the grounds that the watchman had abandoned his employment, that the injury was directed against the watchman for purely personal reasons, and thus, that the accident did not arise out of the employment.¹⁷

North Carolina apparently would not be so liberal. In *Smith v. Newman Machinery Co.*¹⁸ almost the same situation arose with the exception that the store was *on* the employer's premises. There the court recognized the special hazard of the watchman but said: ". . . the facts in the case at bar disclose that he was not making his rounds at the time of the injury or performing any service for his employer,"¹⁹ and denied recovery.

¹⁶ HOROVITCH, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS vii. "The author does not argue for unlimited liability in all cases. But if some of the judges could be present in the classrooms where compensation cases are being discussed before law students or students in economics, and hear the reactions of those who will dominate the scene when we are no longer here, they would cease their attempt to fly in the face of common sense, and stop introducing narrow common-law rulings into compensation cases. They would no longer attempt to stem the tide of reasonable liberality which the acts promised, and which should have arrived at our shores generations ago. . . . An ashman's widow cannot understand how an intelligent judge can rule that she and the five children must go on charity because her husband did not wait for the employer's truck to stop, but had jumped off when it was going three and one-half miles an hour, in order to rush or facilitate his work. To tell her it was an 'added risk' is to raise her contempt for the law." For a criticism of this work see Malone, Book Review, 23 N. C. L. REV. 173 (1945).

¹⁷ GA. CODE ANN. § 114-102 (1920). ". . . nor shall 'injury' and 'personal injury' include injury caused by the wilfull act of a third person directed against an employee for reasons personal to such employee." The North Carolina Act does not contain this provision but the court has judicially interpreted the Act in accord with it. *Harden v. Thomasville Furniture Co.*, 199 N. C. 733, 155 S. E. 728 (1930). For other cases see note 23 *infra*.

¹⁸ 206 N. C. 97, 172 S. E. 880 (1932). This case has not been cited in a single decision since it was decided.

¹⁹ *Id.* at 99, 172 S. E. at 881. Nightwatchmen are generally given a liberal treatment by the courts in view of their hazardous activity. As the North Carolina Court has described it, they are "within the zone of special danger." *Bain v. Travora Mfg. Co.*, 203 N. C. 466, 468, 166 S. E. 301, 302 (1932); *West v. East Coast Fertilizer Co.*, 201 N. C. 556, 559, 160 S. E. 765, 766 (1931). Some states require, either by legislative enactment or by judicial interpretation, that the worker be employed in a hazardous or extrahazardous occupation in order to be covered by

Generally, an assault inflicted on a workman by a third person is regarded as "accidental" within the meaning of the act.²⁰ Also, it meets the "arising out of" requirement when the employment is such as naturally to invite an assault, as when the employee is protecting his employer's property and the assault naturally results because of the employment and not because of something unconnected with it.²¹ But if the assault is unconnected with the employment or is for other reasons personal to the employee and the assailant, it generally does not arise out of the employment.²² In such case the employment is not the cause of the assault, though it may be the occasion thereof.²³

The North Carolina Court has laid down the following test for determining whether an accidental injury arises out of an employment: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected."²⁴ Of course, it is in the application of this test that the court has difficulty. The decisions both by the Commission and the courts seem to be wholly inconsistent at times, as can be seen by a few pertinent examples. Recovery was denied when an employee, who was in his car ready to leave the plant,

the act. *Hoffman v. Hazelwood*, 139 Or. 519, 10 P. 2d 349 (1932); *Annot.*, 83 A. L. R. 1018, 1067 (1933) (concerning watchmen as being within the classification of hazardous duty). The North Carolina Act does not distinguish between hazardous and non-hazardous employment.

²⁰ Cases cited note 13 *supra*. *Beem v. H. D. Lee Mercantile Co.*, 337 Mo. 114, 85 S. W. 2d 441 (1935); *Indian Territory Illuminating Oil Co. v. Jordan*, 140 Okla. 238, 283 Pac. 240 (1929).

²¹ *American Mut. Ins. Co. v. Smith*, 54 Ga. App. 320, 187 S. E. 724 (1936) (watchman killed while making rounds); *Griffin v. McLellan Stores*, 1 I. C. 144 (1929), N. C. W. C. A. Ann. 41 (1955) (store walker stabbed while apprehending thief); *Todd v. Eastern Furniture Mfg. Co.*, 147 Md. 352, 128 Atl. 42 (1925) (watchman killed by personal enemy; compensable because of nature of employment).

²² *New v. Crystal Ice & Coal Co.*, A-785 (Feb., 1942), N. C. W. C. A. Ann. 42 (1955) (claimant injured in fight after he had been fired or quit); *Neill v. Ragland Const. Co.*, 216 N. C. 744, 6 S. E. 2d 491 (1940) (two watchmen in dispute over matter foreign to their employment); *I. T. I. O. Co. v. Lewis*, 165 Okla. 26, 24 P. 2d 647 (1932) (watchman shot for unknown reason); *Tise v. Newman Machine Co.*, 1 I. C. 237 (1930), N. C. W. C. A. Ann. 42 (1955) (fight having no relation to employment); *January-Wood Co. v. Schumacher*, 231 Ky. 705, 22 S. W. 2d 117 (1929) (watchman killed by wife's paramour); *Pioneer Coal Co. v. Hardesty*, 77 Ind. App. 205, 133 N. E. 398 (1921) (watchman killed for personal reasons).

²³ The courts seldom apply the "but for" test as laid down in a New Jersey decision. The claimant was employed at a butcher shop and was shot in the eye by an arrow as he was burning trash in the backyard of the shop. The court said: "But for the employment, the appellant would not have been in the backyard and in the path of the arrow." *Gargiulo v. Gargiulo*, 24 N. J. Super. 129, 93 A. 2d 598 (1952), *aff'd*, 12 N. J. 807, 97 A. 2d 593 (1953).

²⁴ *Withers v. Black*, 230 N. C. 428, 433, 53 S. E. 2d 668, 672 (1949); *Conrad v. Cook-Lewis Foundry Co.*, 198 N. C. 723, 726, 153 S. E. 266, 269 (1930). It is not necessary that the employment be the sole cause of the injury, just so it is a contributing cause. *Mississippi Products, Inc. v. Gordy*. — Miss. —, 80 So. 2d 793 (1955).

got out and slipped on a fruit peeling after having been beckoned to by a watchman;²⁵ but was allowed when an employee slipped on oil in the street as he was going for the mail.²⁶ Also, recovery was denied when an employer was stabbed in the back for an unknown reason while he was working in a mill;²⁷ but was allowed when a nightwatchman was killed by an unknown assailant,²⁸ or a robber.²⁹

In those cases where the accident has been brought about by means other than an assault, the test of whether it arises out of and in the course of the employment is the same as in the assault cases. There was no recovery where a nightwatchman fell asleep on a train track and was killed by a passing train;³⁰ where a nightwatchman was bitten by a spider while engaged in his work;³¹ and where a watchman was sitting in a chair in front of defendant's garage waiting until he was to make his next round, and was struck by a wheel that ran off the axle of a passing car.³² It was thought that in these cases causal connection was absent. But where a cemetery keeper was run over by a car as he was crossing the street to the funeral home, the risk was incidental to the employment and arose out of the employment.³³

The fact that the employee is performing personal acts for his own benefit will not in itself bar recovery.³⁴ The court relied heavily on this

²⁵ *Lockey v. Cohen, Goldman & Co.*, 213 N. C. 356, 359, 196 S. E. 342, 344 (1938). "When an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment." *Id.* at 359, 196 S. E. at 344.

²⁶ *Clinton v. Shuford Nat. Bank*, 9304 (Sept., 1940), N. C. W. C. A. Ann. 39 (1955). The Commission distinguished the *Lockey* case, *supra* note 25, on the grounds that it was not clear there whether or not the employee was on duty at the time of the accident.

²⁷ *Phillips v. Highland Pk. Mfg. Co.*, 9129 (May, 1940), N. C. W. C. A. Ann. 42 (1955).

²⁸ *Stanland v. Wilmington Term. Whse. Co.*, 2 I. C. 331 (1931), N. C. W. C. A. Ann. 42 (1955).

²⁹ *West v. East Coast Fertilizer Co.*, 201 N. C. 556, 160 S. E. 765 (1931); *accord*, *Malloy v. Caldwell Wingate Co.*, 284 App. Div. 798, 135 N. Y. S. 2d 445 (1954) (watchman found dead one story below where he usually worked); *Schmitt v. Bay Ridge Hospital*, 277 App. Div. 957, 99 N. Y. S. 2d 632 (1950) (watchman found dead at foot of stairs where his work might well have taken him, even though it was on a public street); *Southern Cotton Oil Co. v. Bruce*, 249 Ala. 675, 32 So. 2d 666 (1947) (watchman accidentally shot by young son of watchman's employer).

³⁰ *Davis v. Elk-Dixie Furniture Corp.*, 3768 (Sept. 16, 1933), N. C. W. C. A. Ann. 36 (1955).

³¹ *Howard v. Statesville Flour Mills Co.*, 4869 (Nov. 3, 1934), N. C. W. C. A. Ann. 37 (1955).

³² *Bunting v. State Hwy. & P. W. Comm.*, 9526 (July, 1940), N. C. W. C. A. Ann. 37 (1955).

³³ *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. 2d 680 (1952).

³⁴ *Naranja Rock Co. v. Dawal Farms, Inc.*, 74 So. 2d 282 (Fla., 1954); *Wamhoff v. Wagner Electric Corporation*, 354 Mo. 711, 190 S. W. 2d 915 (1945); *McCarter v. Ruby Cotton Mills, Inc.*, A-1405 (Dec. 28, 1942), N. C. W. C. A. Ann. 44 (1955); *Keel v. Brown Paving Co.*, 9963 (Jan., 1941), N. C. W. C. A. Ann. 44 (1955); *Clews v. Blythe Bros. Co.*, 8609 (April, 1939), N. C. W. C. A. Ann. 44 (1955); *McKinley v. Belk's Dept. Store*, 5676 (Sept., 1935), N. C. W. C. A. Ann.

principle in the present case. Usually if he has abandoned his work completely he will be unable to recover.³⁵ It is not necessary that the employee be in the exact spot designated by the employer; but in the cases that have arisen in North Carolina the court has been careful to say that the employee was in a place where he had a right to be.³⁶ It is generally stated that if the injury has no relation to or connection with the employment and is undertaken solely for the pleasure and convenience of the employee or a third person, it is not compensable.³⁷ However, if it is done pursuant to continued acquiescence by the employer, the result is sometimes different.³⁸

North Carolina, both at Commission and court level, has held generally to the narrower view in the type of cases under consideration in this note. The principal case seems to lean toward a far broader construction of the act and on its exact facts seems to reach a desirable result. However, as was said above, the purpose of the act is not to place upon the employers the burden of absolute liability for all injuries to their employees,³⁹ so there must be a dividing line, and each case must be decided separately. This will naturally produce inconsistencies, and it will take time and experience to harmonize the various fact situations with the standards that are set up.

HAMLIN WADE.

44 (1955); *In Re* Bollman, 73 Ind. App. 46, 126 N. E. 639 (1920). *But see* Hanson v. Globe Indemnity Co., 85 Ga. App. 179, 68 S. E. 2d 179 (1951) (injury sustained during fifteen minute rest period not compensable). The courts sometimes make a distinction, which seems to be unreasonable, between injuries sustained during a definite rest period and those sustained while stopping work specifically to do certain personal acts.

³⁵ *Vollmer v. City of Milwaukee*, 254 Wis. 162, 35 N. W. 2d 304 (1948); *Stallcup v. Carolina Wood Turning Co.*, 217 N. C. 302, 7 S. E. 2d 550 (1940); *Smith v. Hauser & Co.*, 206 N. C. 562, 174 S. E. 455 (1934); *Pittsburgh Coal Co. of Illinois v. Industrial Commission*, 323 Ill. 54, 153 N. E. 630 (1926). Compensation probably was denied in these cases because the injury was not in the course of the employment.

³⁶ *Howell v. Standard Ice & Fuel Co.*, 226 N. C. 730, 40 S. E. 2d 197 (1946); *Brown v. Carolina Aluminum Co.*, 224 N. C. 766, 32 S. E. 2d 320 (1944); *Gordon v. Thomasville Repair Co.*, 205 N. C. 739, 172 S. E. 485 (1934).

³⁷ *Bell v. Dewey Bros.*, 236 N. C. 280, 72 S. E. 2d 680 (1952); *Montgomery v. Maryland Casualty Co.*, 39 Ga. App. 210, 146 S. E. 504 (1929); *Guiliano v. Daniel O'Connell's Sons*, 105 Conn. 695, 136 Atl. 677 (1927); *Kraft v. West Hotel Co.*, 193 Iowa 1288, 188 N. W. 870 (1922). *But compare* *Puffin v. General Electric Co.*, 132 Conn. 279, 43 A. 2d 746 (1945), where claimant was allowed recovery for severe burns suffered as a result of lighting a cigarette and setting fire to her angora sweater while she was in the rest room on the employer's premises during her employment.

³⁸ *Wamhoff v. Wagner Electric Corporation*, 354 Mo. 711, 190 S. W. 2d 915 (1945); *Annot.*, 161 A. L. R. 1461 (1945); *Peppers v. Wiggins Drug Stores, Inc.*, 1 I. C. 164 (1929), N. C. W. C. A. Ann. 54 (1955); *Taylor v. Hogan Milling Co.*, 129 Kan. 370, 282 Pac. 729 (1929).

³⁹ The English counterpart to the American Workmen's Compensation Acts also requires that the injury must be by accident arising out of and in the course of the employment, but there is one notable distinction. The accident is presumed, in the absence of evidence to the contrary, to have arisen out of the employment once it is proved to have been in the course of the employment. *National Insurance (Industrial Injuries) Act*, 1946 (c. 62) § 7(4).