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THE NEW YORK WORKMEN'S COMPENSATION LAW.

BY MAURICE J. O'CALLAGHAN, of the New York Bar.

Despite the fact that this law has been upon our statute books for nearly three years; that it has been reviewed and upheld by our highest courts, including the Supreme Court of the United States;¹ and that more than one hundred and twenty thousand cases have been determined under its provisions, a great body of the public at large and even many members of the Bar are unfamiliar, not merely with its terms, but even with its theory and its principles. Yet this is not surprising, for the character of this legislation is so novel and so revolutionary, when compared with all previous rules of common law regarding the relation of master and servant. But covering, as this new law does, the business life of the whole community and being a necessary part of the operation of every important business conducted within the state, it is hardly possible for any of us to escape, for any considerable period of time, coming upon the Workmen's Compensation Law, in one way or another.

For many years prior to the enactment of this law it was realized that the development of modern business conditions had rendered the old common law doctrines, applicable to the relation of master and servant, inequitable. The whole theory of employers' liability for negligence, with its defenses of contributory negligence, fellow servant's negligence and assumption of risk, is based upon fictions invented by the Courts from time to time in days gone by, and is inapplicable to the modern conditions of employment. In the highly organized and hazardous industries of the present day, the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible, by any method, correctly to ascertain the facts necessary to form an accurate judgment, and, in a still larger proportion, the expense and delay required for such ascertainment, amount, in effect, to a defeat of justice. Under the old system, the injured workmen was left to bear the greater part of the industrial accident loss alone, which, because of his limited income, he was unable to sustain, so that he and those dependent upon him were overcome by poverty and became a burden upon public or private charity. Litigation was

¹*N. Y. C. R. R. Co. v. White*, U. S. Supreme Court, March 6, 1917; except as to cases arising under admiralty jurisdiction, *Jenks v. Southern Pacific Co.*, U. S. Supreme Court, May 21, 1917.

costly and tedious, encouraging corrupt practices and arousing antagonism between employers and employees.²

The reformation of these conditions became the object of much serious thought and study, and the attention of our leaders and legislators, in search for a betterment of this condition, was directed to the principles of what is known as Workmen's Compensation Insurance, prevailing in many countries abroad. While comparatively new in this country, the nations of the Old World had, in several instances, adopted this system many years ago.

It is based upon an analysis of the relations existing between master and servant. The situation has been described in the *White* case, *supra*, like this: employer and employee by mutual consent engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire loss. In the nature of things there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury, not mortal, but resulting in his total or partial disablement, temporary or permanent, with a corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; nature itself prevents this from being evaded or shifted to another, and the law makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain, that, on the grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective

²*N. Y. C. R. R. Co. v. White*, U. S. Supreme Court, March 6, 1917.

of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents.

A commission was appointed in 1909 by the Legislature of the State of New York to examine into and report upon labor conditions in the state, and due to the very valuable work of this commission, more than any other agency, workmen's compensation was written into our judicial system. The first Workmen's Compensation Law was declared unconstitutional,³ but in December, 1913, the adoption of an amendment to the Constitution, expressly permitting the Legislature to enact such a law, paved the way for the present statute, which took effect in July, 1914.

The Workmen's Compensation Law of New York, to use Mr. Justice Pitney's analysis, establishes forty-two groups of hazardous employments; defines "employee" as a person engaged in one of these employments upon the premises or at the plant or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer, subject to its provisions, to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By section 11, the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in section 50, an injured employee, or his legal representative in case death results from the injury, may at his option elect to claim compensation under the Act or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the

³*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.

negligence of a fellow servant, that the employee assumed the risk of this employment, or that the injury was due to contributory negligence. Compensation under the Act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death the compensation is known as a death benefit, and includes funeral expenses not exceeding one hundred dollars, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits, except as provided by the Act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. Provision is made for the establishment of a Workmen's Compensation Commission* with administrative and judicial functions, including authority to pass upon claims to compensation, on notice to the parties interested. The award or decision of the commission is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions. By section 50, each employer is required to secure compensation to his employees in one of the following ways: (1) by insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) by furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself. If an employer fails to comply with this section he is made liable to a penalty in an amount equal to the *pro rata* premium that would have been payable for insurance in the state fund, during the period of non-compliance; besides which, his injured employees or their

*Now the State Industrial Commission.

dependents are at liberty to maintain an action for damages in the courts, as prescribed by section 11.

The practice under the law is very simple, and, as a matter of fact, every effort is made to make the proceedings for the payment of compensation as informal, easy and expeditious as possible. When an employee is injured and his disability exceeds fourteen days, for which period no compensation is allowed under the law, if he desires to avail himself of his right to compensation he files with his employer a claim for compensation for the injury. The injury itself he must have reported in writing within ten days after the accident⁵ and the law requires the employer to report to the State Industrial Commission all injuries sustained by his employees, whether claims for compensation are made for them or not. After the claim has been made by the employee to his employer, if the employer admits the justice and legality of the claim, he can enter into an agreement with his employee under the terms of which the employee is paid compensation at the rate of two-thirds of his regular weekly wages until the termination of the period of disability. In the case of a loss of certain members, such as an arm, hand, or foot, etc., the law itself provides a specific number of weeks to which the employee is entitled for the loss of such member. The employer is also obliged to provide, if requested by the employee, whatever medical attention is necessary, for a period of sixty days following the date of the accident.

If the employer does not admit the propriety of his employee's claim for compensation and refuses to enter into the agreement mentioned above, the employee then has recourse to the State Industrial Commission and he presents a sworn notice to the Commission of the facts of the accident and the nature of his injury and the matter is then placed before the Commission for a hearing to determine whether or not the claim is a compensatable one, of which hearing both employer and employee are given notice and at which both are allowed to introduce whatever evidence they may have to offer. The Commission then makes its ruling. The vast majority of cases are not heard by the State Industrial Commission but by deputy commissioners presiding over different districts into which the state is divided, but if a case is of a peculiar nature or presents intricate or novel questions, a hearing may be had before the Commission itself. The same is also true where a party feels aggrieved by the decision of a deputy commissioner,

⁵But the Commission has power to excuse failure to give notice, and usually does. See, however, *Bloomfield v. November*, 219 N. Y. 374.

in which case he may succeed in inducing the Commission to reopen the claim, hear further proof or argument, and perhaps set aside the action of the deputy commissioner.

From the decision of the Commission, an appeal lies to the Third Department of the Appellate Division of the Supreme Court, sitting in Albany. An appeal is taken by filing a notice of appeal within thirty days after a copy of the decision of the Commission is sent to the party.

According to the usual practice in appeals at law the appellant must prepare and serve the record on appeal, which contains the papers and testimony upon which the Commission acted in making its decision, and also a copy of the decision of the Commission and the notice of appeal. Appeals in workmen's compensation cases have a priority over all other cases on the court's calendar and an adjudication of the question involved can be speedily obtained. The Attorney-General is the attorney of record for the State Industrial Commission and represents the Commission before the court and defends its action. An appeal to the Court of Appeals from the decision of the Appellate Division is regulated by the provisions regarding appeals to that Court in the ordinary actions for negligence.

The theory and provisions of this law being unlike any other known to our jurisprudence, and of such recent origin, it has fallen to the lot of the Commission and the courts to blaze the way in the interpretation of the law, as to its meaning and its application to different situations. Not every business enterprise comes within the purview of the act and it is a very close question sometimes to decide whether or not a particular business is a hazardous one, such as the act contemplates, or not. Nor is every accident sustained by an employee, while engaged in a hazardous business, compensatable under the law. The law provides that the injury must be an *accidental* one and must have *arisen out of and in the course of the employment*. Whether or not the injury is an accidental one; whether or not, under certain circumstances, it arose out of the employment, or in the course of the employment, it is very difficult to determine, in many instances. What is meant by "employment" under the act, and in relation thereto, who is an "employer" and who is an "employee" are also points, which, in many cases, have given rise to grave doubts as to the precise interpretation of the act, and have led to many interesting and sometimes conflicting decisions.

According to the Workmen's Compensation Law⁶ an injury must be "an accidental injury" and⁷ "an accidental personal injury". These are not defined in the law. The State Industrial Commission, however, has drawn upon the British Workmen's Compensation decisions for the definition of an accident and has held it to be "an unlooked for mishap or untoward event which is not expected or designed."⁸ The element of time also enters into the determination of whether a particular injury is accident or not. So, if the injury develops slowly it can hardly be held to be expected and, therefore, is not an accidental one. For instance: a flying splinter may instantly destroy the vision of one employee; work in poor light may gradually blind another. The former would be an accidental injury, the latter not. Disease resulting from an accident is compensatable but not an accident resulting from a disease.⁹

The accidental injuries for which workmen receive compensation must arise out of *and* in the course of their employment.¹⁰ The difficulty here is just where and when, as a man quits work at night or comes to work in the morning, does employment cease and begin; and what are the natural and proper hazards of his employment.

The Workmen's Compensation Commission decided that the dependents of a street railway motorman who, having finished his day's run, was mortally injured by an automobile while hurrying from the carbarn to catch one of the company's cars to the city to get his watch tested in accordance with the company's rules, was entitled to compensation. The Appellate Division, in reversing this award, pointed out that the employee had ceased his hazardous occupation of motorman, had signed his name to the register as indicative that his day's work was over, had passed out of the carbarn and had reached the middle of the public highway when he was struck by the automobile. The court said that the immediate errand upon which he was bent, having his watch tested in accordance with the company's rules, was not an *incident*, but a *condition*, of his employment. The Court of Appeals affirmed the decision of the Appellate Division.¹¹

⁶Sec. 3, sub. 7, W. C. L.

⁷Sec. 10, W. C. L.

⁸*Yume vs. Knickerbocker Portland Cement Co.*, 3 S. D. R. 353.

⁹*Collins vs. Brooklyn Gas Co.*, 171 App. Div. 381.

¹⁰Sec. 3, subs. 4 and 7; sec. 10, W. C. L.

¹¹*Devoe v. N. Y. State Rys.*, 169 App. Div. 472; *aff'd* 218 N. Y. 318; see also *Berg vs. Great Lakes Dredge & Dock Co.*, 173 App. Div. 82; *Hotelling v. Standard Oil Co.*, 6 S. D. R. 308.

Even assuming that an employee is engaged in the service of his employer at the time of his injury, it is often very difficult to determine whether or not the accident sustained by him can be said to arise "out of" the employment. In that connection the rule is frequently stated:

"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 be fairly traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman 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 to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."

Albert Gleisner was janitor of an apartment building, in which general capacity he occasionally repaired its plumbing, covered its pipes with asbestos, did painting and carpentry jobs and operated its steamheating boiler. These enumerated tasks were hazardous under the Workmen's Compensation Act. However, he fell and broke his leg while mounting a ladder on his way to the roof to hang out a flag. While the task of hanging a flag was incidental to his occupation as janitor, it was not incidental to his plumbing and carpentry or other special hazardous tasks, and the injury sustained by him therefore in this respect did not come under the law.¹²

A carpenter sent to install machinery in a tannery complained of being ill. An employee of the tannery indicated to him the place of storage of some Epsom salts. By mistake for the salts,

¹²*Gleisner v. Gross & Herbener*, 170 App. Div. 37.

he took a deadly poison and died in an hour. His widow presented a claim to the Commission under the Compensation Law and an award was made by that body. The Appellate Division affirmed the award, but the Court of Appeals reversed it upon the ground that "assuming that this occurrence constituted an accident under the act and that it arose in the course of decedent's employment, we are entirely unable to see that it 'arose out of his employment'. * * * Decedent's illness, and his attempt to minister thereto, were not ordinary and natural incidents to his employment."¹³

A very famous case arising under the New York Workmen's Compensation Law is that of *DeFillippis vs. Falkenberg*.¹⁴ In that case the claimant, a fifteen-year-old factory girl, lost the use of an eye by the sportive scissors thrust of a girl co-employee. The court held that while the accident arose "in the course of" it did not "arise out of" her employment. "The injury resulted solely from the sportive act of a co-worker who was in no way representing the master and which act in no way grew out of, or was connected with, the employment." The opinion of Mr. Justice Lyon is very interesting in its exhaustive examination of the law on the question of what accidents are to be construed as arising out of the employment. During the course of his argument, he refers to many decisions of the British courts under their Workmen's Compensation Law, and, incidentally, he holds that the decisions of those courts, in construing the sections of their law, which are similar to ours, are quite pertinent and instructive, in interpreting our own act.

It has frequently been held, however, that injuries sustained by employees as the result of an assault by a fellow employee, or a third party, are compensatable, provided the assault is connected in some way with the master's business; but not otherwise. In *Cowen vs. Cowen's New Shirt Laundry*,¹⁵ the manager of the laundry was shot by an employee whom he had discharged. The shooting took place eight months after the murderer had been dismissed from the employment. An award of compensation was denied in this case by the Commission, with the unanimous approval of the Appellate Division.

But where the assault is provoked through some act done in the furtherance of the master's business, compensation should be allowed.

¹³*O'Neil v. Carle Heater Co.*, 218 N. Y. 414.

¹⁴170 App. Div. 153; aff'd, no opinion, 219 N. Y. 581.

¹⁵Appellate Division, December 26, 1916.

A policeman employed by a mining company was stabbed to death by a man whom he had arrested at the request of a co-employee. The Commission's award of compensation¹⁶ was affirmed by the Appellate Division and the Court of Appeals. Also, in the case of a foreman attacked by two subordinates whom he had reprimanded for poor work, the Commission's award of compensation for disability due to the injuries so received,¹⁷ was affirmed by the Appellate Division and the Court of Appeals; as was likewise the decision of the Commission, making an award in favor of a workman crippled in a fight with two discharged employees, whose places he had taken.¹⁸

"Employment" and in connection therewith, what is meant by "employer" are also fruitful sources for disputes and close decisions under the Workmen's Compensation Act. The act defines "employment" as employment only in a trade, business or occupation carried on by the employer *for pecuniary gain*,¹⁹ and, therefore, injuries to employees of private individuals, clubs, societies, etc., whose objects have no connection with pecuniary gain, are not compensatable. So it was that until a recent amendment of the law, employees of the state and of municipalities were not included within the provisions of the law.

One of the most important decisions under the Act was made in a case arising under this section. The alleged employer was engaged in the manufacture of macaroni, one of the employments enumerated as hazardous in the Workmen's Compensation Law. The alleged employee was a carpenter and builder, employed by the macaroni company to make certain alterations in its factory building. While making such alterations, he was killed by a collapse of the building. His dependents presented a claim under the law for death benefits to the Commission, which made an award. On appeal, the Appellate Division reversed the award, in an exceedingly interesting and illuminating opinion, written by Mr. Justice Kellogg.²⁰ He writes: •

"A judge, who hires an ordinary carpenter to come to his office or house and put in a new window, is not engaged in a hazardous business under the law. 'Employment' is defined by subdivision 5 of section 3 of the law to include 'employment only in a trade, business or occupation carried

¹⁶*James vs. Witherbee, Sherman & Co.*, 2 S. D. R. 483.

¹⁷*Yume vs. Knickerbocker Portland Cement Co.*, 3 S. D. R. 353.

¹⁸*Harnett vs. Steam Building Co.*, 2 S. D. R. 492. See also the valuable opinion of Pound, J., in *Heitz vs. Ruppert*, 218 N. Y. 148.

¹⁹Sec. 3, sub. 5, W. C. L.

²⁰*Bargey vs. Massaro Macaroni Co.*, 170 App. Div. 103.

on by the employer for pecuniary gain.' If the employer in a hazardous business uses his employees in doing something which may not be a hazardous employment in itself, but the work is a part of his general employment and incidental to it, we may well say that the employee received the injury while engaged in a hazardous employment. But where a man engages a carpenter by the hour to do some work upon his premises in the way of improvements, I cannot feel that he is engaged in the hazardous employment of structural carpentry or repair of buildings as contemplated by group 42 of section 2 of the Workmen's Compensation Law."

The case was also reviewed by the Court of Appeals, and the action of the Appellate Division sustained.²¹ There, Mr. Justice Collin, speaking for the Court, said:

"The determination of the question here, through the application of these provisions (of the Workmen's Compensation Law) is not difficult. The Company was an employer because it employed men in a hazardous employment, to wit, preparing macaroni, a food-stuff. Bargey, the deceased, was not an employee because he was not engaged in the preparation of macaroni. The placing of the partition (in which he was engaged) was not an adjunct of or within the department of employment of preparing macaroni. It was a specific act for which Bargey was specially employed, which had no relation to the hazardous employment except that it made more useful within the contemplation of the employer the building in which the employment was carried on. He was not engaged in the preparation of macaroni, even as in partitioning off a part of the residence of a physician as a professional office, he would not be engaged in the occupation of practicing medicine. He was not, within the intendment of the law, an employee of the company."

These decisions are in entire harmony with the purpose and spirit of the Compensation Law. The theory of the law is not one of damages, to which the old principles of common law or employers' liability acts apply, according to the repeated declarations of the courts, but is based upon the economic principle that the cost of workmen's injuries, due to the hazards of a particular business, is to be borne by that business.

Sometimes, a workman has, apparently, two employers and it becomes the duty of the Commission and the Court to determine which of the two is liable for compensation. Here, it would seem, the Court has fallen into serious error.

²¹218 N. Y. 410.

The first case that arose under the Workmen's Compensation Law on this question was the case of *Gimber vs. Kane*.²² In that case, Gimber was employed generally by one party and hired by him, with a wagon and team, to Kane and while so employed was injured. The Commission made an award against Kane and, after appeal, the Appellate Division affirmed the award upon the authority of *Miller vs. North Hudson Contracting Co.*²³ An examination of the case of *Miller vs. North Hudson* will show that it was not one arising under the Workmen's Compensation Law but one at law arising under the Employers' Liability Act. In it it was held that where the contractor hires teams and drivers from another and places them under the exclusive control and authority of its foreman, the relation of master and servant exists between the contractor and the drivers of the teams hired, within the meaning of the Labor Law, rendering the contractor liable for negligence resulting in injury to a driver. It therefore seemed, after the decision in the *Gimber* case, that cases similar to that case were to be governed by that line of cases at common law in which *Miller vs. North Hudson* was included. It was not, however, to remain so for any great length of time. The very next case decided by the Appellate Division established a new course. In *Dale vs. Saunders*²⁴ the facts were as follows:

Saunders Brothers, alleged employers, were engaged as manufacturers of brick. They employed a number of teamsters to drive their wagons and from time to time Saunders Brothers furnished these teams with drivers to one Patrick Walsh, who conducted a sand bank for the purpose of delivering sand to patrons. Dale was one of the teamsters so employed and was sent by Saunders Brothers to Walsh for the purpose of performing this delivery service for Walsh. The team and wagon were placed by the servants and employees of Walsh, and while Dale was engaged in shoveling sand into the wagon, the sand from the bank caved in, killing Dale. Although the facts in this case were admittedly the same as in the *Gimber* case the Workmen's Compensation Commission made an award directly opposite to its award in the *Gimber* case and held the general employer liable for the compensation. This contradictory position was made a point on appeal and the Appellate Division cut the Gordian knot by holding that the injured man was engaged in *two* hazardous em-

²²155 N. Y. Supp. 1109.

²³166 App. Div. 348.

²⁴171 App. Div. 528.

ployments, and that *both* the general and the special employers were liable for the compensation, and strange to say, straight-away affirmed the award against the *one* of them whom the Commission had previously decided to make liable. On the appeal of this case,²⁵ the Court of Appeals, first of all disregarded the holding of the Appellate Division, in the *Gimber* case. Mr. Justice Pound, writing the opinion of the Court said:²⁶

"In negligence cases the question often arises as to the proper application of the doctrine of *respondeat superior* when an employee whose negligence causes an accident is at the time in the general pay and service of one and under the control and direction of another. The latter has been held liable as a special employer when it could be said that the employee was his servant at the time of the accident in a sense and degree which served to impose liability for negligence. (*Higgins vs. Western Union Telegraph Co.*, 156 N. Y. 75; *Howard vs. Ludwig*, 171 N. Y. 507). The question, who is the master, also arises at times in employees' actions for negligent injuries. But the question in this case is not one of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of *respondeat superior* has no application here, nor are the rules of employers' liability for negligence controlling."

In its decision the Court of Appeals also disregarded the reasoning of the Appellate Division that both the general employer and the special employer were liable in that the injured man was engaged in two employments. The Court said:²⁷

"Saunders Bros. carried on the business of trucking for pecuniary gain. No claim is made that Walsh was carrying on the business of trucking for pecuniary gain. Dale was working for Saunders Bros. as a teamster when he met the accident that caused his death. He was engaged in teaming, not in 'the operation of a sand pit'. (Workmen's Compensation Law, sec. 2, group 19). The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team. (*Matter of Costello vs. Taylor*, 217 N. Y. 179)."

Immediately after, the same Court had before it the case of *Nolan vs. Cranford Company*.²⁸ The situation therein was exactly the same as in the *Gimber* case which had never reached the Court

²⁵218 N. Y. 59.

²⁶At page 62.

²⁷At page 63.

²⁸219 N. Y. 581.

of Appeals. Nolan was generally employed by John Kane. Cranford Company hired certain teams, tricks and drivers from Kane and among them was Nolan. While driving his truck, with a load of dirt for the Cranford Company, he was injured and killed. A claim was presented by his widow to the Commission against the Cranford Company, and the Commission made an award against that company. This award was sustained by both the Appellate Division and the Court of Appeals, without opinion, on the authority of the *Miller vs. North Hudson* case. It would therefore seem that the Court of Appeals disregarded the theory, propounded by it in the *Saunders* case, that the proper test to determine who was the employer was the test: *to the hazards of what business is the injury due?* It should also be noted that the Courts have followed the rule of the common law in determining the *Gimber* and *Nolan* cases, in direct contradiction of their frequently expressed principle that cases arising under the Workmen's Compensation Act were to be determined without reference to either the principles or the decisions in common law cases.

The theory, followed by the Court of Appeals in the *Saunders* case, but disregarded in its other decisions, dovetails nicely into the scheme of the Workmen's Compensation Law. Apply it to the *Nolan* case, for example. Kane, the truckman, the owner of a truck and team and general employer of the employee, Nolan, would stand the loss if his wagon broke down or was destroyed; he would stand the loss if his horse fell, broke a leg and had to be shot; he would stand the loss if his harness burned. Then why should not he stand the loss if his man, the driver of the truck and team, should meet with an accident? Is there any difference in principle under the Compensation Law in these losses, and should they not all be charged up against the operating expenses of his business as a truckman? Or is the truckman to be excused from all liability of this act,—despite the fact that he comes within the provisions of the act enumerating hazardous employments? The truckman is paid for the hiring of a team, truck and man and can charge the operating expense, which includes the cost of workmen's compensation insurance, up to the hirer, just the same as any other person engaged in a hazardous business must charge to the cost of production his expenses and get an increased price for his goods. Cranford Company, the hirers, are in precisely the same situation as the purchaser and consumer of goods from a manufacturer. It paid Kane for the services that Kane rendered it and included in that payment was an amount to pay for the increased burdens.

laid by the Workmen's Compensation Act upon Kane, and we are confronted with the fact, that, if the Cranford Company is liable to Nolan for compensation, it is in the position of having paid for his compensation twice. The compensation that is paid to a disabled workman, or to his dependents when he is killed, is, under the theory of the act, to take the place, and be in lieu, of the wages of the workman. It therefore requires no great stretch of the imagination to assume that the logical place from which the compensation should come is the same source from which the wages are paid.

The Cranford Company was at no time liable for the wages of Nolan. Had Nolan at any time not been paid his week's wages his remedy would have been solely against Kane. Yet, Nolan killed or disabled, the Commission and the Courts determine that the Cranford Company, and not Kane, is liable for his compensation. That the person or corporation that pays the wage is the person or corporation that should be liable for the compensation, is certainly a common sense rule and the only rule really in accord with the theory and principles of the Compensation Law. As it has often been pointed out, the principle of compensation is to make each business bear the cost of the injuries due to the hazards of that business. It would seem clear that since these claimants have been injured or killed on account of the hazards of trucking, which under the Act is a hazardous employment, the cost of these injuries should be borne by the business of trucking. There is no satisfactory solution of the difficulties arising in this connection as yet, and each new claim becomes in turn a fresh lawsuit.

The Commission and the Courts have now wrestled vainly with this troublesome problem for nearly three years and the only remedy, it is suggested, lies in legislative action. That was the remedy adopted by Great Britain and we would do well to follow her example. In that jurisdiction the definition of employer in the Workmen's Compensation Act²⁹ contains the following:

"Where the services of a workman are temporarily lent or let on hire to another person by a person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person."

²⁹6 Edw. VII, Ch. 58, Sec. 13.

This provision expressly covers the situation which confronts us in this State. It is a fair and equitable solution and one in perfect accord with the compensation theory. It relieves the special employer from the burden of paying the workman twice as he has been forced to do by our courts, as pointed out above; it reiterates the principle that each business must bear the cost of the injuries due to the hazards of that business; and it logically taxes for compensation that source from which the workman's wages come.³⁰

³⁰It had been the author's purpose to have reviewed further aspects of the Workmen's Compensation Law in the next issue of the REVIEW for this year, but while this number was in press it was determined by the editors, as expressed elsewhere herein, to close the REVIEW with this number.