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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

JOAN HELLE, Surviving Spouse of)
LYLE HELLE, Deceased,)

Claimant-Appellee,)

Filed January 31, 1978

vs.)

GLOBE LIFE & ACCIDENT INSURANCE)
COMPANY,)

Employer-Appellant,)

371
2-58063

And)

CHUBB & SON, INC.,)

Insurance Carrier-Appellant)

Appeal from Marshall District Court - Paul E. Hellwege, Judge.

Defendant-employer and its insurance carrier appeal trial court's judgment reversing the industrial commissioner's denial of workmen's compensation to claimant.
AFFIRMED.

Jack W. Rogers and Clyde Putnam, Jr., of Putnam, Putnam & Putnam, of Des Moines, counsel for appellants.

Ralph F. McCartney, of McCartney, Erb & Sutton, of Charles City, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-employer, Globe Life and Accident Insurance Co., and its insurance carrier, Chubb and Sons, Inc., appeal the trial court's judgment reversing the industrial commissioner's denial of workmen's compensation benefits to the widow of Lyle Helle, an insurance agent. In the initial arbitration decision, the deputy industrial commissioner found that an employer-employee relationship existed between Globe Life and Helle and that Helle's fatal injury in a motel swimming pool arose "in the course of" his employment but did not arise "out of" that employment. See §§ 85.3(1) and 85.61(6), The Code. As a result of that ruling, Helle's surviving spouse, Joan, the claimant herein, was denied recovery.

Upon review by the industrial commissioner, the deputy's decision was affirmed, except the commissioner further concluded that Helle's presence in the deep end of the swimming pool was "somewhat risky" in light of the fact that he was unable to swim. Claimant then appealed to district court, where the decision of the commissioner was reversed and the court held as a matter of law that Helle's injury arose "out of" his employment and, therefore, his widow was entitled to compensation. See § 86.26, The Code.

Globe Life and its insurance carrier now assert that the trial court erred in making findings of fact contrary to those of the industrial commissioner, and deciding that an employer-employee relationship existed and that the incident resulting in Helle's death arose "out of and in the course of" his employment.

In 1968, Helle contractually agreed to serve as an insurance agent for Globe Life. That contract specified that it was not to be construed to create an employer-employee relationship and that Helle was to be an "independent contractor." However, both industrial commissioners and the trial court concluded that an employer-employee relationship existed. See §§ 85.18 and 85.61(2) and (3)(b), The Code. After reviewing the record in light of the criteria set forth in *McClure v. Union, et al., Counties*, 188 N.W.2d 283, 285 (Iowa 1971), which govern our analysis of this issue, we hold that the district court correctly concluded that an employer-employee relationship existed between Globe Life and Helle. See *Taylor v. Horning*, 240 Iowa 888, 891-892, 38 N.W.2d 105 (1949); *Swain v. Monona County*, 163 N.W.2d 918, 921 (Iowa 1969).

The employer and insurance carrier also contend that the trial court improperly made its own findings of fact contrary to those of the industrial commissioner. It is settled that the industrial commissioner's findings of fact are conclusive where the evidence is in dispute or reasonable minds may differ on the inferences fairly drawn from the facts. Such findings have the same standing as a jury verdict. However, where the facts are not in dispute and different inferences could not be reasonably drawn therefrom, a question of law arises and the court is not bound by the commissioner's findings or conclusions. *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429, 431 (Iowa 1970); *McClure v. Union, et al., Counties*, supra, at 284. In the instant case, the trial court explicitly adopted the findings of fact of the industrial commissioner, but merely disagreed regarding the application of the relevant legal principles to those facts. •

Finally, defendants argue that the trial court erred in concluding that the incident resulting in Helle's death arose "out of and in the course of" his employment. In **McClure**, these terms were defined in the following manner:

" 'in the course of' the employment refers to time, place and circumstances of the injury. 'Arising out of' relates to the cause and origin of the injury. An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto." (citations omitted) 188 N.W.2d at 287.

Arising "out of" employment, perhaps the more analytically complex concept of the two, has been further described thusly:

" 'An injury 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.' " *Christensen v. Hauff Bros.*, 193 Iowa 1084, 1088, 188 N.W. 851 (1922).

The record in the instant case indicates that Helle had been directed by his employer not only to stay at a certain motel but to remain on the premises the evening of his death in order to participate in an interview with a prospective candidate for a sales position with the company. Decedent apparently requested and received permission to go swimming in the motel pool while waiting for the interview to take place, and, subsequently, drowned therein.

We have little difficulty deciding, as did the trial court, that the incident resulting in Helle's death arose "in the course of" his employment. See Golay v. Keister Lumber Co., 175 N.W.2d 385, 386-388 (Iowa 1970); 1 Larson, Law of Workmen's Compensation §§ 21-25 (1965). However, defendants strenuously argue that the injury did not arise "out of" his employment. Claimant contends that the decedent was in the same position as an employee who lives "on the premises" and is on call. Alternatively, she argues that decedent was an employee engaged in a recreational activity on the employer's premises during a lull in work, the lull not being caused by the worker. See Dowen v. Saratoga Springs Comm., 267 App. Div. 928, 46 N.Y.S. 2d 822 (1944). The trial court adopted the following approach in its ruling:

"If decedent had remained in his motel room while awaiting the second interview and in the process had sustained an injury that caused his death, this Court doubts that anyone would make the claim that the injury did not arise out of his employment. As a result of his employment, decedent was required to stay upon the motel premises. He was not confined to his room. He received permission to go to the pool. In essence, he was on call. Decedent was at a place (the motel) where the employer's business required his presence. There is no proof of a rash act on decedent's part. He was seen standing in the shallow end. He was next seen in a position of peril in the deep end. There is no showing that he voluntarily entered the deep end. The doctrine of rash acts as enunciated in Lamb v. Standard Oil Co., 250 Iowa 911, is not applicable here. This is a case where the facts are not in dispute. Involved essentially is a question of law, and the Court is not bound by the Commissioner's findings or conclusion."

We find that the trial court's analysis is well-reasoned and amply justified by the record. The posture taken by the district court is especially strengthened by the fact that Helle felt that the circumstances were such that he had to ask permission to go swimming and that the employer-employee relationship was of such a nature that he felt that his employer had the power to exert enough control and authority over him to affect his actions and behavior, even during this interim period of time between interviews.

Although found not to be dispositive by the industrial commissioner, we are persuaded, as was the district court, that *Linderman v. Cownie Furs*, 234 Iowa 708, 13 N.W.2d 667 (1944), cited with approval in *Casey v. Hansen*, 238 Iowa 62, 69, 26 N.W.2d 50 (1947) and *Crees v. Sheldahl Telephone Co.*, 258 Iowa 292, 300, 139 N.W.2d 190 (1965), is applicable to our inquiry in the instant case. In *Linderman*, recovery was allowed where decedent drowned while on a fishing trip to Minnesota which he had won as the reward in a salesman's contest arranged and paid for by his employer as a means of stimulating sales and improving sales ability. The court then proceeded to state the test to be applied in a case such as this:

"Where an employer merely permits an employee to perform a particular act, without direction or compulsion of any kind, the purpose and nature of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both an injury arising out of it will usually be compensable; on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable.'" 234 Iowa at 714. See Annot., 47 A.L.R.3d 566, 582.

Upon a review of the record in the instant case, we are convinced that the criteria enunciated in *Christensen* and *Linderman* were adequately met and that compensation was warranted. Had it not been for the direction of his employer, Helle would not have been at the motel on the night in question in the first place, and had he not been at the motel, he would have had no occasion to seek permission to use the swimming pool during the lull in work. Further, the great degree of control and domination that the employer possessed over Helle's movements at the motel served to confer upon the employer a substantial benefit, notwithstanding the fact that Helle engaged in swimming activity during the period of time in which Globe Life maintained such control. This degree of control and the direct benefit derived therefrom are best reflected by the fact that Helle felt he had to ask permission and the employer felt he had sufficient control over Helle to affect his actions while at the motel.

Consequently, we conclude that the district court properly allowed recovery and affirm the judgment below.

AFFIRMED.

All judges concur except Allbee, C. J., and Carter, J., who dissent.

ALLBEE, C.J. (dissenting)

Because Lyle Helle's unfortunate drowning did not arise out of his employment, I must respectfully dissent.

The phrase "arising out of," as used in the Code, requires a showing of a causal relationship between the employment and the injury. *Buehner v. Hauttly*, 161 N.W.2d 170, 171 (Iowa 1968); *Volk v. International Harvester Co.*, 252 Iowa 298, 300, 106 N.W.2d 649 (1960). For an injury to arise out of one's employment it must appear that the employee was performing some service in some degree for his employer, or some act required by the employer, or was to some extent contributing to the interests of such employer. *Kraft v. West Hotel Co.*, 193 Iowa 1288, 1292-93, 188 N.W. 870 (1922).

In application of the foregoing legal principles, the record supports the Industrial Commissioner's finding that decedent, in swimming, was not performing a service for his employer; he was not required to swim; no benefit to his employer from swimming is shown. There is substantial evidence in the record that decedent went to the motel pool for his own pleasure and benefit, notwithstanding his inability to swim. Certainly "[a]n accident cannot be said to arise out of the employment when it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself." *Kraft v. West Hotel Co.*, supra at 1293.

Linderman v. Cownie Furs, 234 Iowa 708, 13 N.W.2d 677 (1944), upon which the majority places much reliance, is readily distinguished from the facts and circumstances presented by this record. In that case, claimant's decedent was drowned while engaged in an employer sponsored fishing trip. The trip was an integral part of a scheme to increase sales by stimulating employees to greater effort. The fishing trip was the culmination of an activity designed for employer benefit, thereby justifying compensation.

Significantly, the Industrial Commissioner found for the claimant on the facts in *Linderman* and against the claimant in the present case. Thus the scope of judicial review is considerably different as between the two cases. On this appeal, we need not determine whether decedent's death did not arise out of his employment as a matter of law. It is sufficient that there is evidence from which the Commissioner could have so found. Such finding is binding on the trial court and should be reinstated.

CARTER, J., joins in this dissent.