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WORKMEN'S COMPENSATION ACTS AND AIRCRAFT ACCIDENTS

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The important and well-rounded opinion of the New York Court of Appeals in *Reinhardt* v. *Newport Flying Service Corporation et al.*, to the effect that a hydroplane while on the water is a ship subject to the admiralty jurisdiction and hence beyond the jurisdiction of the Workmen's Compensation Commission of the state within whose territorial confines the accident has occurred has been a landmark during the twelve years that it has been on the books. Says Cardozo, J., in writing the opinion of the court:

> The latest of Man's devices for locomotion has invaded the navigable waters, the most ancient of his highways. Riding at anchor is a new craft which would have mystified the Lord High Admiral in the days when he was competing for jurisdiction with Coke and the courts of the common law.[1]

The question whether the interstate commerce clause has a similar but, of course, a more far-reaching effect is very interesting since aviation in its most useful phases is interstate and even international rather than intrastate. The opportunity to raise this question was presented to counsel for the employer in two recent cases. In *Colonial Air Transport, Inc., et al.* v. *Edna Tallman,* a Connecticut corporation employed a pilot at its main office in New York. The flight was from Massachusetts to New Jersey. The crash occurred in Connecticut. The Court of Appeals without an opinion[2] affirmed a decision of the Appellate Division which was also rendered without an opinion,[3] upholding an award of the New York Industrial Commission in favor of the wife of the pilot. In *Murray* v. *Industrial Accident Commission et al.*,[4] a California resident by mail made a contract with a Missouri pilot to fly an airplane (just purchasesd in Missouri) to California. The crash occurred in California. The petitioner appeared in person. The opinion of the Supreme Court bears unmistakable evidence of generally careful presentment of the case by counsel for the employer. The question of interstate commerce, however, was not raised (so far as appears from the opinion), and an award in

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1. 232 N. Y. 115, 133 N. E. 371, 18 A. L. R. 1324 (1921).
2. 259 N. Y. 512 (1932).
3. 234 App. Div. 809, 253 N. Y. S. 938 (1932).
4. 216 Cal. 340, 14 P. (2d) 301 (1932); reversing 10 P. (2d) 97 (1932).

favor of the petitioner was affirmed. Whether the passage of the Air Commerce Act by Congress and the Air Commerce Regulations adopted by the Department of Commerce under such Act take all interstate aviation out of the jurisdiction of the various industrial accident commissions is therefore an open question so far as decisions are concerned.[5]

This leaves the question of intrastate aviation to be considered. It has been contended that the Wisconsin statute, which adopts in large measure the provisions of the Air Commerce Regulations, excludes the state Workmen's Compensation Commission from all jurisdiction over aviation cases. The court in answering this contention says:

> It does not appear that either Congress or the Department of Commerce has adopted any rule as to the compensation of injured employees, or the relative rights and obligations of employees and employers in cases of injury to the former while engaged in the employment. As those subjects do not necessarily require a general system or uniformity of regulation, the power of Congress in relation to them is not exclusive, and consequently the states may act within their respective jurisdictions until Congress does act and thus by the exercise of its authority overrides all conflicting state legislation. Consequently, the state Workmen's Compensation Act is applicable to employees and employers who are engaged merely in intrastate aircraft navigation, if they are otherwise subject to its provisions. There is no reason to hold the state Workmen's Compensation Act inapplicable to such an employee unless at the time of the injury he was engaged in interstate commerce or in work so closely related thereto as to be a part thereof.[6]

It may therefore be taken as settled that intrastate flying is within the local workmen's compensation acts, so far as the interstate commerce clause is concerned. The cases hereinafter referred to bear out this conclusion though they do not discuss this problem but rather assume that the local compensation commission has jurisdiction over accidents arising out of intrastate aviation.

The development of aviation as an industry is certain to bring into the courts an ever-increasing number of compensation cases involving flying. In view of this situation it will be now in order to restate the cases which have already arisen as the principles announced in them will be of the greatest importance in the cases which are to arise.

The obligations of the compensation act being created by statute arise out of the status of employer and employee. How

5. See the article by Roy E. Roos on page 1 of this issue.
6. *Sheboygan Airways, Inc., et al.* v. *Industrial Commission*, 209 Wis. 352, 361, 245 N. W. 178, 182 (1932); reversing 1932 U. S. Av. R. 222.

that status has been created is immaterial. The statute applies automatically if there is a contract of employment. If the employer is an infant he may disaffirm his contract but he can not avoid or evade the statutory liability as to compensation where the accident happens prior to any such disaffirmance.[7]

Whether or not an aviator who entertains gaping crowds by executing somersaults and spiral glides exceeds the limits of gross negligence and becomes guilty of such daredeviltry and foolhardiness as to amount to willful misconduct within the meaning of the act will depend to some extent on what he is employed to do.[8] Clearly, however, an aviator who at the time of the accident (no matter what he may have done previously) performs only straight-away flying and crashes in consequence of the vacuum created in the air by the explosion of a bomb below his machine while flying for a moving picture company is within the protection of the act.[9] The hazards attending on the occupation of an aviator far from taking him out of the protection of the act may even bring him within the definition of "hazardous employment" formulated by the act.[10]

The decisive question in many cases is whether the claimant was an employee or an independent contractor at the time of the injury. If he was an independent contractor no liability under the act would arise.

The test by which to determine this question is the ultimate control over the work. The exclusiveness of the occupation, the manner of compensation, the source of the material and appliances, the right to "hire and fire" and the general recognition of the work as being done under an employment are merely elements which assist in determining where the ultimate control is.[11] This right to control should not be confused with the ability to control wisely. A pilot employed to fly the president of a tool company on company business in the president's airplane, whose wages while so acting (about three days a week) are paid by the company but are not included in the payroll on which premiums for compensation insurance are calculated, is an employee of the company and not

7. *Rahman* v. *Bethal*, 258 N. Y. S. 286 (1932).

8. The situation of a moving-picture flyer will differ materially from that of a transport pilot in regard to what he is employed to do.

For a case not arising in connection with workmen's compensation, but valuable as holding a stunt pilot under contract with a moving-picture company to be an independent contractor, see *Montijo* v. *Samuel Goldwyn, Inc. of Cal.*, 65 Cal. App. Dec. 72, 297 P. 949 (1931).

9. *Stites* v. *Universal Film Mfg. Co.*, 2 Cal. I. A. C. 653 (1915).

10. *Fort Smith Aircraft Co.* v. *State Industrial Commission*, 151 Okla. 67, 1 P. (2d) 682 (1931).

11. *Texas Employers Ins. Assn.* v. *Kelly*, 56 S. W. (2d) 1108 (1932).

an independent contractor though he naturally will take only general directions from such president.[12]

Other examples can easily be supplied. A pilot who enters into an agreement with an airplane owner to take up passengers on occasions for a circular ride and to instruct students, his compensation being fixed at 40% of the sums received while the owner assumes all the expenses of keeping the plane in condition and fuel, is an employee and not an independent contractor. The owner is in control though the pilot collects the money in his absence and though the pilot is in custody of the plane while operating it.[13] Though an officer of the immediate employer of the pilot is in the airplane while moving-pictures are being taken where such officer exercises no control or direction but the pilot receives all of his instructions as to time, place and method of flight from the moving-picture company, the relation of both general and special employer exists and the pilot may recover compensation from the moving-picture company.[14] A person who conducts an airport and makes an arrangement with the owner of an airplane to pilot such airplane for such owner at $10 per hour when he is otherwise free and who receives his instructions from such owner or the owner's brother-in-law is an employee and not an independent contractor.[15] The same is true of a pilot who undertakes to fly an airplane from Missouri to California in consideration of his expenses and with the purpose of increasing his flying experience where the only discretion reposed in the pilot is in the choice of the routes, everything else being directed by the owner of the airplane who, however, remains in California.[16]

Where the claimant is conceded to be an employee the most important question will be whether the particular act which led to his injury or death was within or beyond the scope of his authority. If he acted beyond his authority his employer clearly is not liable. No hard and fast rule can be formulated. All that can be done is to trace the process of judicial inclusion and exclusion

12. *Idem.*

13. *Hinds* v. *Department of Labor & Industry of State of Wash.*, 150 Wash. 230, 272 P. 734 (1928).

14. *Famous Player-Lasky Corp.* v. *Ind. Accident Comm.*, 194 Cal. 134, 228 P. 5, 34 A. L. R. 765 (1924). Compare *Montijo* v. *Samuel Goldwyn Inc., of Cal.*, cit. note 8.

15. *Meyer* v. *Industrial Commission*, 347 Ill. 173, 179 N. E. 456 (1932). For a note, see 3 JOURNAL OF AIR LAW 316-320.

16. The fact that the compensation is merely sufficient to meet his expenses during his employment does not affect his status. A person may work for his board and lodging and during such employment is just as much an employee as if he were paid a stipulated sum per day. The amount of his wage has no bearing on his relation with his employer. *Murray* v. *Industrial Accident Commission of Cal.*, 216 Cal. 340, 14 P. (2d) 301 (1932), reversing 10 P. (2d) 97 (1932).

as applied to aviation cases. Such will be the purpose of the following pages.

The rule is well established that an injury is compensable when it is sustained in performing an act which is fairly incident to the prosecution of the master's business though such act may not be performed at the building or premises where the major part of the work of the employee is performed. Where, therefore, an airport employee gives instruction in flying to students he remains within the scope of his employment though he takes the airplane some distance away from the airport. Owing to the very nature of his work such instruction flights cannot be confined to the boundaries of the airport or the space above the airport.[17] Similarly an employee of an auto brokerage company who while cranking an airplane at an airport in the course of repairing it as a mechanic acts within the course of his employment. There certainly is no difference between cranking an airplane or cranking an automobile, truck or tractor engine under like circumstances.[18]

Other examples can be readily supplied. A licensed pilot who in order to increase his flying experience flies an airplane from Missouri to California acts within the course of his employment though his compensation is confined to his expenses and though the manufacturer delivers to him another airplane than that contracted for.[19] A test flight made by a salesman after a new propellor has been installed is a proper precaution and is within his employment. It is to the interest of the employer that the airplane operate properly so as to permit the salesman to go from place to place as rapidly as possible thereby giving the employer the benefit of the additional time gained to devote to the sale of the employer's goods.[20] The manager of a moving-picture theatre who in the performance of his duty to bring all possible trade to the theatre attends various civic activities, trade excursions, membership drives, and so forth, in various parts of the state acts within the "usual course of the trade, business, profession or occupation of his employer" when he boards an airplane to fly to another city for the purpose of advertising his employer's business.[21] The chief inspector of an airplane manufacturing company

17. *Fort Smith Aircraft Co.* v. *State Industrial Comm.*, cit. note 10.
18. *Standard Accid. Ins. Co.* v. *Arnold*, 1 S. W. (2d) 434 (Tex. Civ. App., 1927).
19. The airplane contracted for had the serial number N.C. 10983. The plane flown was numbered N.C. 10984. *Murray* v. *Indust. Accid. Comm. of Cal.*, cit. note 16.
20. *Hammer* v. *General Electric X-Ray Corp.*, 1932 U. S. Av. R. 242 (Minn. Indust. Comm., 1931). For a very similar case, see *Schonberg* v. *Zinsmaster Baking Co.*, 173 Minn. 414, 217 N. W. 491 (1928).
21. *Constitution Indemnity Co.* v. *Shytles*, 47 F. (2d) 441 (1931). For a note, see 3 JOURNAL OF AIR LAW 137.

who after the plant has worked over-time to make an airplane ready for delivery on the next day enters the airplane to examine the inspection cards and to sign the packing sheets and stays in it while the operations despatcher "revvs" the engine and proceeds to fly the plane to the storage hangar (about a mile from the manufacturing plant) is acting within the course of his employment.[22] A pilot regularly employed by the manufacturer of vertoplanes to test them does not cease to be an employee of the manufacturer by accepting a bonus of $100 from the purchaser of the plane and by being told by the vice-president of the manufacturing company before the test that he is "fired" so far as the manufacturer is concerned.[23] The fact that an X-ray equipment salesman who uses an airplane for travel disregards his employer's directions to take out liability insurance covering persons other than himself does not take him outside of the course of his employment.[24]

What cases are to be excluded is a question of approximately equal importance. On this question the decided cases while not quite so numerous are numerous enough to afford substantial help. A person who works for the owner of a garage as a salesman and mechanic is not "performing services growing out of and incident to his employment" when he goes up in his employer's airplane for the purpose of distributing circulars advertising a "Booster Day" for the merchants of his community.[25] A pilot who gives acquaintances a free ride solely for their amusement without in any manner benefiting his employer acts outside the scope of his employment. Where he, at the instigation of the passengers or otherwise to gratify their or his own desire for an extraordinary thrill, voluntarily undertakes a power dive, thus subjecting his employer's property to great and needless peril instead of saving and protecting it by all the means within his power, he is clearly not entitled to compensation.[26] The same is true in increasing measure of a pilot engaged to transport passengers who engages in acrobatic flying 700 feet above a crowd of 8,000 persons without the permission of his employer thus violating the criminal code.[27] An employee of a Petroleum Company who owns

22. *Crutcher* v. *Curtiss-Robertson Airplane Mfg. Co.*, 331 Mo. 169, 52 S. W. (2d) 1019 (1932). For a note, see 4 JOURNAL OF AIR LAW 116.
23. *Lambert* v. *Heath Aircraft Corp.*, 1932 U. S. Av. R. 238 (Mich. Dept. of Labor & Industry).
24. *Hammer* v. *General Electric X-Ray Corp.*, cit. note 20.
25. *Indrebo* v. *Industrial Commission of Wisc.*, 209 Wis. 272, 243 N. W. 464 (1932).
26. *Sheboygan Airways, Inc.* v. *Field*, 209 Wis. 352, 245 N. W. 178 (1932). For a note, see 3 JOURNAL OF AIR LAW 464.
27. *Datin* v. *Vale*, 1931 U. S. Av. R. 175 (Pa. Dept. of Labor & Industry, 1931).

an unlicensed airplane and has no pilot license but uses the airplane in violation of the criminal law and without his employer's knowledge to obtain balls and seats for his employer's pumping machinery from a city forty miles away easily reached by an automobile furnished by the employer voluntarily exposes himself to a peril which is not necessarily or inherently or reasonably incident to his work and cannot recover compensation.[28] A student flyer who accommodates a pilot by starting his motor is not within an insurance policy which insures against damages suffered in the course of his employment.[29]

Another important question may arise in connection with employment, namely, what is necessary to constitute one an employer. A land appraiser who steps out of his regular calling to engage in an endeavor to sell airplanes as a sideline and who asks another to fly an airplane purchased by him and supposed to be the newest thing in aviation from Missouri to California is not making a casual employment but is in the course of a business in which he is attempting to establish himself. The fact that he has at the time made no sales of airplanes does therefore not render the services of the pilot in flying the machine as without the scope of that business.[30] Where an airway company has on various occasions employed from three to five persons, some of whom are its own officers, in moving and preparing its airplane for service and in soliciting and handling passengers and has compensated these persons by giving them a ride and instructing them in flying, the relation of employer and employees exists within the provision of a compensation act requiring three or more employees.[31]

Workmen's compensation commissions are generally regarded and treated as fact finding bodies whose determinations of fact will not be disturbed by the courts if they are supported by evidence. Though therefore the preponderance of the evidence is in favor of the claimant and though there is also a statutory presumption of employment, thus casting on the defendant the burden of overcoming the presumptions, the determination of the commission in the presence of conflicting evidence that the relation existing was not that of employer and employee will not be disturbed.[32]

28. *Bugh* v. *Employers' Re-insurance Corp.*, 63 F. (2d) 36 (1933). For a note, see 4 JOURNAL OF AIR LAW 436.

29. *Judgment of the Prussian Insurance Court at Dortmund*, 1 Archiv für Luftrecht 100.

30. *Murray* v. *Industrial Accident Ins. Comm. of Cal.*, cit. note 16.

31. *Sheboygan Airways, Inc.* v. *Field*, 209 Wis. 352, 245 N. W. 178 (1932). The cases above abstracted will suggest other employer situations which need not be further gone into now.

32. *Gale* v. *State Industrial Accident Comm.*, 80 Cal. Dec. 633, 294 P. 391 (1930). The findings of fact made by the commission on the question of

The duty of the court in reviewing the award made is not to weigh conflicting evidence but merely to ascertain whether there is evidence to support the findings of fact.[33]

Most important industrial concerns prefer to insure against liability under workmen's compensation acts rather than to carry this risk themselves. This may involve a practical difficulty so far as aviation is concerned. Insurance companies are inclined either to refuse to write such insurance or to make the premium prohibitive. It may follow that to include the business of aviation in the compensation act will work the ruin of such business because of this insurance difficulty. This, however, is a matter for the consideration of the legislature and not for the consideration of the courts.[34] Of course, where insurance has once been effected, the question as to whether an employee is covered by the policy or not is determined by the statutes, the policy, and the general nature of his employment and not by the question as to whether the particular thing which he was doing was more or less hazardous and if customarily engaged in would have been subject to a higher rate of premium.

> A construction of the Workmen's Compensation Law which would put a workman engaged in the business of his employer now within and now without the coverage of the policy according to the changing hazards of the particular tasks upon which he might from time to time be engaged, because of the difference in premium rates applicable to the different classes of work customarily engaged in, would be not only un-workable, but intolerable.[35]

The fact that the compensation of a pilot who pilots the president of a tool company about three times a week, which is paid by the company, is not included in the payroll of the company on which premiums for the policy are computed will not be a defense to the insurance company.[36]

The place where an employee is killed may be an important factor in applying the proper workmen's compensation act. It has therefore been held that a resident of New York, drowned in New Jersey while employed by a Delaware corporation having an office in New York to work on a New Jersey airport, who has

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employment will not be disturbed unless entirely without support in the evidence. *Indrebo* v. *Industrial Comm.*, cit. note 25.

33. *Soule* v. *McHenry*, 286 Pa. 49, 132 A. 799 (1926). The award in this case was in favor of the pilot. See also: *Colonial Air Transport, Inc.* v. *Tallman*, cit. notes 2 and 3; *Fort Smith Aircraft Co.* v. *State Industrial Comm.*, cit. note 10; *Jackson* v. *Curtiss-Wright Airplane Co.*, ... Mo. ..., 68 S. W. (2d) 715 (1933).

34. *Fort Smith Aircraft Co.* v. *State Industrial Comm.*, cit. note 10.

35. *Constitution Indemnity Co.* v. *Shytles*, cit. note 21.

36. *Texas Employers' Ins. Assn.* v. *Kelly*, cit. note 11.

never worked for the corporation before, is not employed within the state of New York so as to be entitled to compensation under the New York Compensation Act.[37]

An airport with its hangars and repair shops is a factory within the meaning of the workmen's compensation act.[38] The decision of the Connecticut court that a newspaper reporter who puts his head out of the window of a street-car in order to observe the better an airplane exhibition some distance away is acting within the course of his employment, is referred to herewith for completeness rather than for any other reason.[39]

37. *Baum* v. *New York Air Terminal, Inc.*, 230 App. Div. 531, 245 N. Y. S. 357 (1930). Compare *Jackson* v. *Curtiss-Wright Airplane Co.*, cit. note 33.
38. *Fort Smith Aircraft Co.* v. *State Industrial Comm.*, cit. note 10.
39. *Kinsman* v. *Hartford Courant Co.*, 94 Conn. 156, 108 A. 562 (1919).