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INJURY, DISEASE OR DEATH—SUSTAINED DURING DECLARED OR UNDECLARED WAR—DIRECTLY DUE TO ENEMY ACTION, SABOTAGE OR ACTS OF ARMED FORCES—UNITED STATES—UNDER EXISTING LEGISLATION IT DOES NOT NECESSARILY MEAN THAT SUCH INJURY, DISEASE OR DEATH WILL NOT BE COMPENSABLE.

SYLLABUS:

Under existing legislation, the fact that an injury, disease or death is sustained during a declared or undeclared war, directly due to enemy action, sabotage, or acts of the armed forces of the United States does not necessarily mean that such injury, disease or death will not be compensable.

Columbus, Ohio, March 9, 1951

Hon. Joseph J. Scanlon, Secretary
The Industrial Commission of Ohio
Columbus, Ohio

Dear Sir:

This is in reply to your request for my opinion, which reads as follows:

> "Assuming that one or more persons regarded as employees under the present workmen's compensation law of Ohio suffer injury, disease or death under any one of the following circumstances, is the resulting disability or death compensable as considered having occurred in the course of and arising out of the employment?
>
> "(1) Where such injury, disease or death results from, and is directly due to enemy action against the United States, during a declared or an undeclared war?
>
> "(2) Where such injury, disease or death results from, and is directly due to sabotage during a declared or an undeclared war?
>
> "(3) Where such injury, disease or death results from, and is directly due to the acts of the military forces of the United States of America, however inadvertently caused, during a declared or an undeclared war?"

In answering your request for my opinion it will be necessary for me to assume that the employes in your hypothetical situation are performing their usual duties at their customary place of employment when the incidents you describe occur.

Article II, Section 35 of the Constitution of the State of Ohio, establishes a state fund: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, *occasioned in the course of such workmen's employment.*"

(Emphasis added.)

Section 1465-90 of the General Code, provides that the Industrial Commission has the power to deny a claim for compensation for an injury on the ground "that the injury did not occur in the course of or arise out of the employment."

Your questions therefore resolve themselves into a consideration of the meaning of the phrase, "occur in the course of or arise out of the employment."

I will first consider your question numbered 1.

As far as I am able to determine, this specific question has never been presented for court decision. For that reason, it was necessary to search for, and to analyze closely analogous situations. Cases in which an employe, while at his job, was injured or killed by an act of God, are in my opinion closely allied to the problem which you present and must, therefore, be given scrutiny.

The case of Slanina v. Industrial Commission, 117 Ohio St., 329, was one of the first workmen's compensation cases in Ohio involving a consideration of the phrase herein in question, where an employe was injured by an act of God, while discharging the duties of his employment. In that instance a tornado blew a telephone pole against the employe's automobile while he was on a trip for his employer. The court purportedly followed the cases of Fassig v. State, ex rel., Turner etc., 95 Ohio St., 233, and Industrial Commission v. Weigandt, 102 Ohio St., 1, which had earlier held that Article II, Section 35 of the Constitution, and the section of the statutes requiring that an injury be received in the course of employment and arising out of employment to be compensable have not been complied with when the injury is sustained outside of, and is disconnected with the employment. In the Slanina case it was said

that since the employe was subjected to the elements to the same degree as other persons in the community, and his duties did not expose him to peculiar dangers, his injury did not arise out of his employment.

The following language from the Slanina case is particularly pertinent:

> "The fact that the injury was caused by the act of God does not, however, necessarily deprive the injured party of the right to recover under the Workmen's Compensation Act, *if the employe's duties exposed him to some special danger not common to the public.*" (P. 333.) (Emphasis added.)

Some time later the Supreme Court of Ohio had before it for consideration the case of Industrial Commission v. Hampton et al., 123 Ohio St., 500. In that case, a yard foreman had taken refuge in a warehouse of his employer, during a tornado. The warehouse was blown down on the employe, crushing him to death. The court held that as yard foreman, the employe was called to all parts of the employer's premises, and one of the hazards of his employment was the fact that he might be on any part of the employer's premises upon the approach of a violent storm and would find it necessary to seek just such shelter, and that his death was compensable as arising out of his employment. The Slanina case was distinguished.

Some time later, came the decision of Carden v. Industrial Commission, 129 Ohio St., 344. In that case, an employe was killed by lightning while using a steel hand shovel in his employment. The court held that his death was compensable because the steel shovel in the employe's hands subjected him to a hazard greater than that of the general public and therefore his death arose out of his employment.

In Walborn v. Fireproofing Company, 147 Ohio St. 507 (1947,) an employe who had driven to work, slipped and fell on the ice and snow that covered the company parking lot, and the entire city of Youngstown, as a result of a general storm during the preceding day and night. The court held the injury not compensable, citing the Slanina case and quoting from its syllabus. The first two paragraphs of the syllabus in the Walborn case indicate the basis of the decision:

> "1. Under the law of Ohio a workman is not entitled to obtain compensation for a disability unless he has suffered an injury in the course of and arising out of his employment.

"2. The hazard must be peculiar to the work and not common to the general public in the community."

The above cases would indicate that injuries received as a result of an "Act of God" may or may not be compensable as being received in the course of and *arising out of employment* depending upon whether the injured employe was, by the very nature of his employment, subjected to and exposed to a peculiar danger substantially greater than that to which the ordinary public was exposed.

In answer to your first question, it is my opinion that, generally speaking, wars either declared or undeclared being between nations, everyone in the community would be subjected to the same basic hazards during a declared or undeclared war and, therefore, as a general rule, injuries, diseases or death arising in such a manner would not be compensable. However, as in the cases where injury was sustained as a result of an "Act of God" a trier of fact would be warranted, in case of proof by the claimant that the employe was subjected by the very nature of his employment to a hazard or danger substantially greater than that to which the public was subjected, in finding, under the presently existing statutes, that such injury or death did "arise out of his employment" as that term is used in Section 1465-90, General Code, and heretofore defined by the courts.

The same considerations are applicable to your questions numbered 2 and 3.

Accordingly, in specific answer to your request, it is my opinion that, under existing legislation, the fact that an injury, disease or death is sustained during a declared or undeclared war, directly due to enemy action, sabotage, or acts of the armed forces of the United States does not necessarily mean that such injury, disease or death will not be compensable.

Respectfully,

C. WILLIAM O'NEILL
Attorney General