

Hillsborough, }
Dec. 2, 1919. }

JOHN REGNIER v. ORLANDO H. RAND.

An employee is entitled to the benefit of the employers' liability act (Laws 1911, c. 163) if he was engaged in manual or mechanical labor and any part of his work was done in proximity to hoisting apparatus or power-driven machinery and if five or more persons engaged in manual or mechanical labor were employed in or about the shop, etc., in which he worked.

Negligence of an employer in leaving a saw unguarded may be inferred from the fact that the employee's work required him to stand near it.

CASE, for negligence. The plaintiff, who worked in the defendant's sawmill, struck his hand against an unguarded slab saw. There were four other men engaged in manual labor, employed in and about the mill. The question whether the plaintiff is entitled to the benefit of Laws 1911, c. 163, was transferred without a ruling by *Allen, J.*, from the January term, 1919, of the superior court.

James E. Banigan and *Samuel J. Dearborn* (*Mr. Banigan* orally), for the plaintiff.

Warren, Howe & Wilson (*Mr. Howe* orally), for the defendant.

YOUNG, J. The fact the plaintiff's work required him to stand very near a saw would warrant a finding that the defendant was negligent in leaving it unguarded. *Osman v. Company*, 78 N. H. 597. Whether the plaintiff is entitled to the benefit of Laws 1911, c. 163, ss. 1, 2, depends on what the legislature intended when it enacted c. 1, *sub. div.* (b). The language the legislature used is all the evidence there is relevant to that issue, and in so far as that is material to the question we are considering, section one reads as follows: "This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, conditions or means of prosecution of such work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid. . . . (b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which

shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor." Laws 1911, c. 163, s. 1.

If this language is given its ordinary meaning, s. 1 is intended to describe the employments in which a person must be engaged to entitle him to the benefit of the act, and the office of *sub. div.* (b) is to delimit the number of persons the master must employ and the kind of work in which they must be engaged and not a danger to which they must be exposed, to entitle them to the benefit of the act. *Boody v. Company*, 77 N. H. 208, 212. In short, the test to determine whether an employee is entitled to the benefit of the act is to inquire whether (1) he was engaged in manual or mechanical labor, (2) any part of his work was done in proximity to hoisting apparatus or power-driven machinery, *Morin v. Company*, 78 N. H. 567, and (3) whether five or more persons engaged in manual or mechanical labor were employed in and about the mill, etc., in which he worked.

Case discharged.

All concurred.

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DANIEL E. BARBER, *by his next friend*, MARY BARBER
v. GEORGE R. JONES SHOE CO.

A servant, while waiting for work, temporarily left his machine and, while engaged in conversation with another servant in the same room and nearby, was injured by an unguarded machine at which such servant was employed: upon the evidence the finding was warranted that the injury was received in the course of employment within the meaning of Laws 1911, c. 163, s. 2.

The master's duty to guard such machine may be properly inferred from the known usage of employees when waiting for work to converse with other operatives at their machines; or, if a guard would have been ineffectual, the master may be at fault in not warning a youthful and inexperienced servant of the danger.

ACTION, for negligence under Laws 1911, c. 163, s. 2. The plaintiff was injured in the defendants' shoe factory upon a heel breast shaver.

Upon a view by the jury they saw a machine in full operation similar to the one upon which the plaintiff was injured, except it was equipped with guards. The defendants were subject to the employers' liability statute, Laws 1911, c. 163, and had not accepted its provisions. At the close of the plaintiff's evidence, the court