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Justice Jesse Carter's Passionate Defense of Workers' Rights: Challenging the Majority's "Legal Legerdemain"

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THE GREAT DISSENTS OF THE “LONE DISSENTER”

*Justice Jesse W. Carter’s Twenty Tumultuous
Years on the California Supreme Court*

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JUSTICE JESSE CARTER'S PASSIONATE DEFENSE OF WORKERS' RIGHTS: CHALLENGING THE MAJORITY'S "LEGAL LEGERDEMAIN"

By Marci Seville*

Introduction

In two 1953 decisions, *Mercer-Fraser Company v. Industrial Accident Commission*¹ and *Hawaiian Pineapple Company Ltd v. Industrial Accident Commission*,² the California Supreme Court considered the proper interpretation of Labor Code section 4553, a provision in the workers' compensation system that allows for an additional monetary award when an employee is injured because of an employer's "serious and willful misconduct."³ The Court gave a restrictive reading to the Labor Code and annulled decisions of the California

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1. *Mercer-Fraser v. Indus. Accident Comm'n*, 40 Cal. 2d 102 (1953) (hereinafter "*Mercer-Fraser*").

2. *Hawaiian Pineapple Co. Ltd. v. Indus. Accident Comm'n*, 40 Cal. 2d 656 (1953) (hereinafter "*Hawaiian Pineapple*").

3. CAL. LAB. CODE §4553 provides that:

The amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of any of the following: (a) The employer, or his managing representative; (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof; (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.

Industrial Accident Commission that had found serious and willful misconduct by the respective employers.⁴ In doing so, the Court departed from its earlier and more expansive view of serious and willful misconduct. In *Mercer-Fraser*, as in a number of other dissents, Justice Carter accused his fellow justices of reasoning that amounted to legal “legerdemain.”⁵

Justice Carter’s passionate dissents in *Mercer-Fraser* and *Hawaiian Pineapple* charged the majority with “blotting out four decades of progress in the field of social legislation for the benefit of the working men and women of this state,”⁶ reverting to “the age-old reactionary concept of property rights above human welfare,”⁷ and engaging in “not only a travesty on social justice but an insidious abuse of judicial power.”⁸

Although the California Supreme Court has yet to overturn the stringent test for serious and willful misconduct developed in these 1953 decisions, subsequent opinions of the Supreme Court and the lower appellate courts have artfully distinguished *Mercer-Fraser* and *Hawaiian Pineapple*, in order to uphold increased awards to injured workers in certain circumstances. While the Court has not adopted Justice Carter’s liberal interpretation of Labor Code section 4553, his eloquent dissents in *Mercer-Fraser* and *Hawaiian Pineapple* stand

4. The Industrial Accident Commission was the administrative agency responsible for adjudicating worker claims under the state workers’ compensation system. The agency is now the Workers’ Compensation Appeals Board.

5. In *Mercer-Fraser*, Justice Carter asked “[b]y what legerdemain may it be said that an employer who is found guilty of serious and wilful misconduct because he knowingly and wilfully failed to provide a safe place for his employees to work, is guilty of negligence only?” (See *Mercer-Fraser*, 40 Cal. 2d at 131). Taken from the French expression *leger de main* or light of hand, legerdemain means a sleight of hand or a cleverly executed trick or deception. Justice Carter’s fondness for characterizing the majority’s analysis as legerdemain can also be found in: *Pacific Mut. Life Ins. Co. v. McConnell*, 44 Cal. 2d 715, 734 (1955) (“The majority opinion is a masterpiece of legal legerdemain.”); *Henderson v. Drake*, 42 Cal. 2d 1, 8 (1953) (“By a skillful process of legal legerdemain the majority opinion attempts to bring to life an attachment which died a natural death ... when plaintiff’s motion for a new trial was granted by the trial court.”); *Simpson v. L.A.*, 40 Cal. 2d 271, 283 (1953) (“The majority of this court indulges in some legerdemain in the field of judicial legislation ...”); *Pridonoff v. Balokovich*, 36 Cal. 2d 788, 794 (1951) (“By what legerdemain is an author immunized from general and exemplary damages when his libelous article is published in a newspaper, but is not so immunized when such article is published in a magazine, pamphlet or other form of publication?”); *American Distilling Co. v. City Council of Sausalito*, 34 Cal. 2d 660, 668 (1950) (“By what legerdemain is such a conclusion reached?”).

6. See *Hawaiian Pineapple*, 40 Cal. 2d at 668 (Carter, J., dissenting).

7. See *Mercer-Fraser*, 40 Cal. 2d at 132 (Carter, J., dissenting).

8. See *Hawaiian Pineapple*, 40 Cal. 2d at 668 (Carter, J., dissenting).

as a moving tribute to the sacrifices of the working men and women of California.

The Workers Compensation System as Social Legislation

The “progress in social legislation,” to which Justice Carter referred in *Hawaiian Pineapple*,⁹ was the development of the state’s workers’ compensation system. As one scholar commented nearly 100 years ago, “[w]ith the advance in industrial life, and the increased use of machinery, increasing the hazard to life and limb, the number of injuries to workmen multiplied.... Breakage of the human machine was just as certain to occur as breakage of the machinery used in carrying on industries.”¹⁰ Workers Compensation laws were enacted to address the fact that “[s]ome employers came to the conclusion ... that it would be cheaper to run the risk of being held liable for accidents than to install improved machine and proper safe-guards.”¹¹ In 1913, the California legislature enacted the Workmen’s Compensation, Insurance and Safety Act,¹² California’s first program mandating that employers provide benefits for employees who suffer work related illnesses or injuries.¹³

The philosophy underlying workers’ compensation legislation is:

the economic principle of trade risk in that personal injury losses incident to industrial pursuits are, like wages and breakage of machine, a part of the cost of production. These laws are human remedial enactments intended to give vitality to the idea that personal injury losses incident to an employee’s services are as much a part of the labor cost of such services as wages paid....¹⁴

9. *Id.*

10. Arthur B. Honnold, *Theory of Workmen’s Compensation* (1917–1918) 3 CORNELL L.Q. 264.

11. *Id.* at 265.

12. Workmen’s Compensation, Insurance and Safety Act (Stats. 1913, ch. 176, § 1) (commonly known as the Boynton Act).

13. Prior to passage of the 1913 act, California, like many states, had a workers compensation law providing for employer’s voluntary participation, the Compensation Act of 1911 (Stats. 1911, ch. 399) (commonly known as the Roseberry Act). For further discussion of the history of the workers compensation movement in the United States, see, Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents* 67 COLUM. L. REV. 50 (1967).

14. Honnold, *supra*, 3 CORNELL L. Q. at 267–68.

A central premise of the workers' compensation system is a trade-off known as the "compensation bargain." The courts have described this bargain as one in which the employer:

assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability.... The employee, without having to prove fault, receives relatively swift and certain benefits to cure or relieve the effects of industrial injury. In exchange, the employee gives up the wider range of civil tort damages potentially available.¹⁵

To balance the employer concessions, the various legislatures immunized the employer against common law suit. Thus, while employees with occupational injuries or illnesses generally cannot sue their employers in a civil court action because of this "compensation bargain," Labor Code section 4553 provides for extra compensation *within the workers compensation system*—a 50% increase in compensation otherwise recoverable—in cases of serious and willful employer misconduct.¹⁶

In discussing the additional compensation for serious and willful misconduct, Justice Carter noted "the basic concept that industry should bear the burden of injuries suffered by working men and women in the course of their employment."¹⁷ Because the employer "could insure against injuries resulting from negligence it was necessary, in order to force employers to comply with safety regulations and provide safe places of employment, that they be subjected to *increased* awards to those injured as the result of their *willful failure to so comply*." (Emphasis added).¹⁸ In Justice Carter's view, the majority's reasoning in *Mercer-Fraser* was "out of harmony with the social philosophy which

15. *Gunnell v. Metrocolor Labs*, 92 Cal. App. 4th 710, 720 (2001) (citing *Shoemaker v. Myers* 52 Cal.3d 1, 16 (1990)).

16. In *Fermino v. FEDCO*, 7 Cal. 4th 701, 713–14 (1994), a case involving false imprisonment by an employer, the Supreme Court described a "tripartite system for classifying injuries arising in the course of employment." There are (1) injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system; (2) injuries caused by employer conduct that intentionally harms an employee, for which the employee may be entitled to extra compensation under Labor Code §4553; and (3) certain limited types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.

17. See *Mercer-Fraser*, 40 Cal. 2d at 131.

18. *Id.*

postulated the statutory provisions here involved and renders them ineffective.”¹⁹

The Majority Opinions in *Mercer-Fraser* and *Hawaiian Pineapple* and Justice Carter’s Response

In *Mercer-Fraser*, the majority annulled a determination of the Industrial Accident Commission (the “commission”) finding serious and willful misconduct by the employer after two workers were killed and two others were seriously injured when a building collapsed. The cause of the collapse was insufficient bracing, a condition known to the employer’s superintendent and which the employer had the means and opportunity to correct. The Court held that the superintendent was not guilty of more than negligence, and that “serious and willful misconduct is basically the antithesis of negligence and . . . the two types of behavior are mutually exclusive.”²⁰ It explained that negligent conduct is “devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom,” while willful misconduct is an act “deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences.”²¹

In *Hawaiian Pineapple*, the majority annulled a commission finding of serious and willful misconduct, where an employer knew about and had failed to take measures to address a dangerous railroad crossing used regularly by the company’s forklift drivers. Citing its opinion three months earlier in *Mercer-Fraser*, the Court noted that “‘serious and willful misconduct’ denotes a greater degree of culpability than mere negligent or even grossly negligent conduct.”²² The majority explained that:

the conduct must be with knowledge of the peril to be apprehended, or done with a positive and active disregard of the consequences. A “reckless disregard” of the safety of employees is not sufficient in itself un-

19. *Id.*

20. *Id.*

21. *Id.*

22. See *Hawaiian Pineapple*, 40 Cal. 2d at 662.

less the evidence shows that the disregard was more culpable than a careless or even a grossly careless omission or act. It must be an affirmative and knowing disregard of the consequences. Likewise, a finding that the “employer knew or should have known had he put his mind to it” does not constitute a finding that the employer had that degree of knowledge of the consequences of his act that would make his conduct wilful. The standard requires an act or omission to which the employer *has* “put his mind.”²³

In *Mercer-Fraser* and *Hawaiian Pineapple*, the high court distinguished, but did not overrule, several of its earlier cases holding, among other things, that “an employer’s mistake in judgment does not relieve him from liability for serious and willful misconduct.”²⁴ The majority concluded that such decisions had no application, because they involved the violation of an express statute or commission safety order, which was not the case in *Mercer-Fraser* and *Hawaiian Pineapple*.²⁵

In addition to Justice Carter’s conclusion that the Court had rolled back forty years of social progress, he was of the opinion that the Court had undercut the will of the legislature and abused its power by refusing to give a liberal construction to section 4553. Carter wrote that the Court had struck a “lethal blow” such that section 4553 was “nullified and stricken from the statute book by judicial interpretation.”²⁶ Noting that the legislature had “declared it to be the duty of the courts to liberally construe the provisions of the workers compensation laws ‘with the purpose of extending their benefits for the protection of persons injured in the course of their employment,’”²⁷ he concluded that the *Mercer-Fraser* decision “... finds no parallel in the annals of the judicial history of this state in its antithesis of liberal construction...”²⁸ He concluded in *Hawaiian Pineapple* that it was the “... old story of the will of the people and the Legislature being defeated by reactionary court decisions.”²⁹

23. *Id.* at 663.

24. *See Mercer-Fraser*, 40 Cal. 2d at 119.

25. *Id.*; *Hawaiian Pineapple*, 40 Cal. 2d at 665.

26. *See Hawaiian Pineapple*, 40 Cal. 2d at 665.

27. *See Mercer-Fraser*, 40 Cal. 2d at 132, citing Labor Code § 3202 which provides that “[t]his division and Division 5 (commencing with § 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.”

28. *Id.*

29. *See Hawaiian Pineapple*, 40 Cal. 2d at 668.

Finally, Justice Carter pointedly expressed his view that the majority was more concerned with saving the employer money than with the life and limb of the state's workers. He emphasized in his *Hawaiian Pineapple* dissent that "... the only reason this hazardous condition was permitted to exist was solely because the maintenance of an adequate safety measure would cost the employer money."³⁰ By its enactment of Labor Code section 4553, the legislature "sought to correct this evil, but the majority of this court, solicitous only of the financial welfare of the employer, says no, it is too great a burden for the employer to bear."³¹ He concluded that "... we are back where we were 40 years ago so far as the enforcement of safety regulations is concerned."³²

Conclusion

Mercer-Fraser and *Hawaiian Pineapple* raised the bar significantly for workers seeking additional compensation under Labor Code section 4553, and the opinions are often cited for the principle that willful misconduct is the "antithesis of negligence."³³ While some commentators have recognized a "contemporary approach" with a return, in some situations, to a more liberal analysis of serious and willful misconduct claims,³⁴ workers still face substantial challenges when seeking additional monetary awards for serious and willful misconduct. When the circumstances are sufficiently egregious, the courts may distinguish *Mercer-Fraser* and *Hawaiian Pineapple*.³⁵ However, Justice Carter

30. *Id.*

31. *Id.*

32. *Id.*

33. See, e.g., *Lambreton v. Indus. Accident Comm'n*, 46 Cal. 2d 498, 503 (1956); *Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (Horenberger)*, 96 Cal. App. 3d 923, 932 (1979); *White v. Workmen's Comp. Appeals Bd.*, 265 Cal. App. 2d 115, 120 (1968); *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 741 (1993) (applying the *Mercer-Fraser* analysis to the interpretation of CALIFORNIA INSURANCE CODE §533).

34. See, e.g., 2 Witkin, Summary of Cal. Law (10th ed. 2006) Workers Compensation, §319, Contemporary Approach ("A return to the liberal view ... took place in *Keeley v. Industrial Acc. Comm'n*, 55 Cal. 2d 261 (1961)."); see also, 1–11 Herlick, Cal. Workers' Compensation Law, (2006) Actionable Employer Misconduct §11.14 [2] ("Appellate decisions indicate two trends in recent years affecting the definition of serious and willful misconduct," discussing cases with a somewhat broader interpretation of §4553, including *Keeley v. Indus. Accident Comm'n*, *supra*, *Dowden v. Indus. Accident Comm'n*, 223 Cal. App. 2d 124 (1963), *Grason Elec. Co. v. Indus. Accident Comm'n*, 238 Cal. App. 2d 46 (1965), and *Rogers Materials Co. v. Indus. Accident Comm'n*, 63 Cal. 2d 717 (1965)).

35. See, e.g., *Keeley v. Indus. Accident Comm'n*, 55 Cal. 2d at 267, noting that *Mercer-Fraser* & *Hawaiian Pineapple* cases "dealt with an entirely different problem than the one

would, no doubt, stand firm in his view that the Supreme Court engaged in “legal legerdemain” in its 1953 rulings and would find unacceptable the cautious and very limited movement away from the stringent *Mercer-Fraser* and *Hawaiian Pineapple* interpretations of Labor Code section 4553. These decisions were, after all, “not only a travesty on social justice but an insidious abuse of judicial power.”³⁶

DISSENT (*Mercer-Fraser*)

CARTER, J. I dissent.

The majority opinion in this case ... annuls the award [of the Industrial Accident Commission] because it interprets [the commission's] findings as supporting a conclusion that petitioner was guilty of negligence only. By what legerdemain may it be said that an employer who is found guilty of serious and wilful misconduct because he knowingly and wilfully failed to provide a safe place for his employees to work, is guilty of negligence only? The answer to this question contained in the majority opinion is based upon a process of reasoning out of harmony with the social philosophy which postulated the statutory provisions here involved and renders them ineffective. This philosophy stems from the basic concept that industry should bear the burden of injuries suffered by working men and women in the course of their employment, and since the employer could insure against injuries resulting from negligence it was necessary, in order to force employers to comply with safety regulations and provide safe places of employment, that they be subjected to increased awards to those injured as the result of their wilful failure to so comply. This philosophy is embodied in our statutes, and cases arising thereunder which have come to this court for review indicate judicious consideration by the Industrial Accident Commission. The case at bar is no exception.

Brushing aside the sophistry with which the majority opinion is replete, what are the realities of the situation here presented? ... A building collapsed in the course of construction and four men working thereon were seriously injured—two of them fatally. It is admitted that the cause of the collapse was insufficient bracing—that this condition was called to the attention of the employer's superintendent and he did nothing to correct it although he had ample time and

here involved ... Neither case involved, held or implied that an employer who intentionally places an employee in a position of known and obvious danger without taking any precautions for his safety could not be guilty of willful misconduct by reason of that fact alone.”

36. See *Hawaiian Pineapple*, 40 Cal. 2d at 668.

the means to do so. In other words the building was unsafe because it was not sufficiently braced and the employer *knew* that it was therefore highly dangerous—a danger that would inevitably result in serious injuries and death. Yet with that knowledge he put the workmen on the job. Certainly if an employer knows a place of work is fraught with grave danger but still compels his employees to face that danger, he evinces a reckless disregard of the safety of his employees. Whatever may have been the motives for his conduct, to save money, or time or to satisfy a sadistic impulse is not important. The weak excuse of the superintendent that he thought the building had enough bracing cannot change the result.... [T]he commission found that the employer knowingly and wilfully failed to provide a safe place of employment for the men who were injured and that such failure constituted serious and wilful misconduct. I do not see how the commission could have found otherwise. But the majority of the court seems to be more concerned with technical terms and phraseology than the liberal application of the law enacted for the protection of working men and women who have suffered loss of life and serious injuries as the result of its violation. In fact, the whole tenor of the majority opinion is to emphasize the burden placed on the employer by this legislation and minimize its salutary objective. It is the age-old reactionary concept of property rights above human welfare: What does it matter that working men and women are killed and injured because industrial enterprises are unsafe so long as employers can escape liability? To guard against injury to employees may cost the employer money, so why should he do so without compulsion? The answer is that experience has shown that some employers will not provide safety devices unless forced to do so, hence the remedial legislation here involved—that life and limb of employees be protected against unnecessary risks even if it costs the employer money to do so. Not only has the Legislature spoken by creating the liability of increased awards where serious and wilful misconduct is involved, but it has declared it to be the duty of the courts to liberally construe the provisions of the act “with the purpose of extending their benefits *for the protection of persons injured* in the course of their employment.” (Emphasis added.) (Lab. Code, § 3202.) This legislation has been generally accepted as extending to working men and women a measure of the economic and social justice to which people in industrial employment are entitled. Thinking people agree that social progress means, generally speaking, the gradual advancement of human welfare toward greater physical, moral and cultural enjoyment of life. The legislation here involved tends toward this objective and should be liberally construed to achieve it. The present decision finds no parallel in the annals of the judicial history of this state in its antithesis of liberal construction with respect to both the act here involved and the proceedings before the Industrial Accident Commission and this court....

... [T]he commission *expressly* found the existence of wilful misconduct in detail... [I]t is said that the misconduct occurred particularly as follows: That at and prior to the time of the collapse the employer "*did knowingly and wilfully fail*"; then follow seven separate paragraphs (a to g) specifying what the employer *wilfully and knowingly* failed to do or did, such as to furnish a safe place for the employee to work, to furnish and use proper safety devices, namely, bracing and guying for the structure so as to prevent its collapse. That such findings are adequate is beyond doubt. If an employer *knowingly and wilfully* fails to furnish a safe place for the employee to work (a safe place of employment is required by the safety laws of this state) or to furnish supports to prevent a certain building from collapsing and injuring and killing workmen, we have the clearest case of serious and wilful misconduct that could be imagined (footnote omitted).

The majority opinion cannot be reconciled with numerous cases... The cases are quite uniform to the effect that permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that the Commission's finding that such conduct is serious and wilful will not be disturbed. The mere fact the employer did not believe the condition was dangerous does not relieve him from liability. Thus in *Blue Diamond Plaster Co. v. Industrial Acc. Com.*, 188 Cal. 403, 409, the employee was killed as a result of the failure of the employer to place guards on machinery. The managing agents of the employer testified that they knew of the condition, but stated that they did not consider the condition unsafe. 'Their mistake in judgment upon that subject cannot be held to relieve their employer from liability.' An award based on serious and wilful misconduct was affirmed. In *Hoffman v. Department of Industrial Relations*, 209 Cal. 383, it was held that where the employer violated the terms of a statute providing for a specified type of temporary flooring and its method of construction to be used when erecting a building, he was guilty of serious and wilful misconduct, even though the employer was ignorant of the provisions of the statute. In *Pacific Emp. Ins. Co. v. Industrial Acc. Com.*, 209 Cal. 412, the employee was injured by an unguarded saw. The employer was held guilty of serious and wilful misconduct although the saw had been in operation but a week, and the employer testified that he intended to place a guard thereon. In *Gordon v. Industrial Acc. Com.*, 199 Cal. 420, the employee was killed in a cave-in of a gravel pit. It was held that compelling an employee to work in a dangerous spot, without taking protective measures, where the employer knows or should have known of the danger is serious and wilful misconduct. In holding an employer guilty of serious and wilful misconduct under somewhat similar circumstances the appellate court in *Johannsen v. Industrial Acc. Com.*, 113 Cal.App. 162, stated: 'Had he (the employer) turned his mind to a considera-

tion of the subject he must have known that a person working in the trench was in jeopardy, which danger could readily have been obviated by the necessary bracing.’”

While the above cited cases differ factually from the case at bar the philosophy and legal concept of those cases is equally applicable here. The dangerous character of the place where the employees were required to work was obvious. If it was not known it was of such a character that it should have been known. Steps could easily have been taken to alleviate the danger but the employer did nothing whatsoever and sent the employees on that dangerous mission with reckless disregard of their safety.... The safety statute here requires that the structure be safe, that is, secured against collapsing by sufficient guy wires or bracing. This the employer knew but wilfully disregarded. Such disregard constituted serious and wilful misconduct.

I would therefore affirm the awards here made.

DISSENT (*Hawaiian Pineapple*)

CARTER, J. I dissent.

By its decision here the majority has completed the reactionary process, commenced by its decision in *California Shipbuilding Corp. v. Industrial Acc. Com.*, 31 Cal. 2d 278, and carried forward by its decisions in *Mercer-Fraser Co. v. Industrial Acc. Com.*, *ante*, p. 102 and *Sutter Butte Canal Co. v. Industrial Acc. Com.*, *ante*, p. 139 of judicial repeal of the workmen's compensation law that an award shall be increased for wilful misconduct of the employer. (Lab. Code, §4553.) I reiterate what I said in my dissents in those cases. The lethal blow has now been struck and section 4553 of the Labor Code has been nullified and stricken from the statute book by judicial interpretation. By these decisions this court has blotted out four decades of progress in the field of social legislation for the benefit of the working men and women of this state, and overruled numerous decisions of this court and the District Court of Appeal without even mentioning them.

The majority opinion holds that neither the findings nor the evidence establishes serious and wilful misconduct.

With reference to the findings, they are clearly sufficient under the authorities cited in my dissent in *Mercer-Fraser Co. v. Industrial Acc. Com.*, *supra*, *ante*, p. 129. They expressly state that the general superintendent of the employer *knew* that his failure to provide safety devices was likely to result in serious injury. While it is also found that he should have had that knowledge, that in no way detracts from the finding of actual knowledge.

Briefly, the facts are that the employer maintained an extremely dangerous condition of its property, that is, a railway crossing which must be crossed by

its employees, and had taken no steps to protect the employees against that peril. I say it took no steps because the evidence shows that the steps it did take were so completely ineffectual as to be no protection whatsoever. Moreover, one of the steps taken, the presence of the signal light to warn of an approaching train, went beyond being ineffectual; it operated as a pitfall and trap for the employees inasmuch as it was operated sometimes and not others. All these conditions the employer knew of, yet it did nothing to correct them.

A witness, Amaro, testified that three days before the applicant employee was injured, he was engaged in the same work, and while driving a lift truck across the railroad tracks, barely escaped being struck by a train. He told Spiegel, the employer's representative in charge, of his near injury and that the signal light should be fixed so as to turn on automatically when a train was approaching because "you couldn't see the train when you came out of the door" to cross the tracks, that is, in effect, that *none* of the employer's devices served to safeguard against the peril; that a watchman or flagman should be put on the crossing. A mirror was placed by the employer at the door the same day of Amaro's near injury purportedly to give an operator of the lift truck a view of approaching trains but it only gave a view 20 feet down the tracks. He saw the employer's superintendent at the crossing after the signal lights were installed and it may be inferred that the latter knew that they operated only sporadically when someone happened to operate them. It was not customary for the truck drivers to stop at the crossing because their work load was heavy. This was also known to the superintendent.

A representative of the employer testified he knew there was a train operating on the crossing at the time of the accident and that no one was operating the stop lights.

Summarizing, the evidence shows that there was here a very dangerous railroad crossing that must be continually traversed by the employees. Its danger was apparent to anyone from a view of the physical facts. The employer knew of that danger prior to the accident because it had placed lights to signal the approach of a train and had a man to operate them during the busier times and because its superintendent was specifically advised by an employee, who had a "close call," of the danger and that none of the devices gave effective protection. In the face of that knowledge the employer failed to do anything about it—permitted its employees to bear the risk of this very real hazard. Certainly it is wholly reasonable to draw an inference that its conduct was in reckless disregard of its employees' welfare. Indeed, its conduct amounts to intentionally subjecting its employees to injury, and this condition was permitted to exist solely because protection would cost the employer money. In the face of the foregoing facts which the record discloses without contradiction, the majority opinion states: "The evidence and the findings of the commission do

not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a wilful one. . . . Looking at the record it is devoid of any substantial evidence that the employer intended to do harm, or that it had actual knowledge of the probable consequences of its failure to provide more adequate safety devices or a safer place to work or that it exercised an affirmative and knowing disregard for the safety of the injured employee." I cannot reconcile the foregoing statements with an honest analysis of the record in this case. It is undisputed that during the so-called busy season, the employer maintained a watchman at the crossing to guard against such accidents as the one here involved. The employer, therefore, knew that the crossing was a dangerous one and that safety measures must be taken to guard against accidents of this character. The only satisfactory safety measure which had been employed was the maintenance of a watchman or an employee to manually operate the blinker lights. This safety measure was abandoned by the employer during the nonbusy season although the risk was just as great to the employee during the nonbusy season as during the busy season. In the face of this factual background may it be said with the slightest regard for the truth, that "The evidence and the findings of the commission do not show that the employer had the knowledge of the consequences of its act or omission necessary to make the performance of that act or omission a wilful one," or that "the record is devoid of any substantial evidence that the employer . . . had actual knowledge of the probable consequences of its failure to provide more adequate safety devices or a safer place to work or that it exercised an affirmative and knowing disregard for the safety of the injured employee."

I am constrained to repeat a statement hereinabove made, that the only reason this hazardous condition was permitted to exist was solely because the maintenance of an adequate safety measure would cost the employer money. The Legislature by its enactment of section 4553 of the Labor Code sought to correct this evil, but the majority of this court, solicitous only of the financial welfare of the employer, says no, it is too great a burden for the employer to bear. So we are back where we were 40 years ago so far as the enforcement of safety regulations is concerned.

It is the old story of the will of the people and the Legislature being defeated by reactionary court decisions. To protect employees against unnecessary risks, the Legislature enacts a law providing that an employer must provide a safe place for his employees to perform their work, and that failure to do so constitutes wilful misconduct on the part of the employer entitling an employee injured thereby to an increased award of compensation. Obviously such a law tends to create increased vigilance on the part of employers to provide safety

devices and thus reduce the number of industrial injuries. There can be no doubt that the present law has had a salutary effect. Its nullification by this court is not only a travesty on social justice but an insidious abuse of judicial power.

I would affirm the award here made.