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EXTENT OF LIABILITY FOR OFF-PREMISES INJURIES IN WORKMEN'S COMPENSATION CASES

The various compensation acts of the United States are based essentially on the original English Compensation Act.[1] Under the theory of these acts, liability is not predicated upon fault or negligence but upon a "personal injury by accident arising out of and in the course of the employment."[2] The Wisconsin Legislature worded its act differently[3] to clarify the meaning of the law.[4]

This article is to consider the question of liability under the compensation acts for injuries sustained by an employee when he is off the premises of his employer. Due to the complexity of the questions involved this discussion must be limited to those cases involving workers who perform their jobs on their employer's premises. The so-called "salesman's clause"[5] and the compensability of injuries to salesmen, are outside the scope of this article and will not be considered. The question is governed by the statutory phrase "arising . . . in the course of the employment." Many problems arise in attempting to define and clarify this phrase, which has been said to be "deceptively simple and litigiously prolific."[6] Perhaps the most succinct definition of the phrase is that it has the same meaning as has the scope of employment under the common law.[7]

I. The Basic Rules

From the countless decisions in the area of workmen's compensation the courts and legal commentators have evolved two basic rules applicable to the "course of employment" provisions of the acts.

The primary rule laid down by the courts is that an injury, to be compensable, must be incurred on the employment-premises during the

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[1] See Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 NACCA L. J. 27 (1951) note 3.

[2] Workmen's Compensation Act of 1897, 60 & 61 Vict. c. 37, §1 (1).

[3] Wis. Stats. (1951), sec. 102.03 (1) "Liability under this chapter shall exist only where the following conditions concur: . . .
(c) Where, at the time of the injury, the employe is performing service growing out of and incidental to his employment . . ."

[4] Recommendation of the Industrial Commission submitted to the Legislature in re: Wis. Laws (1913), ch. 599. "This amendment merely gives effect to the construction placed upon the expression 'growing out of and incidental to his employment' by decisions of the British Courts which gives greater certainty to the law."

[5] Wis. Stats. (1951), sec. 102.03 (1) . . . (f) "Every employe whose employment requires him to travel shall be deemed to be performing service growing out of and incidental to his employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. . . ." Simmons v. Industrial Comm., 262 Wis. 454, 55 N.W. 2d 358 (1952).

[6] Cardillo v. Liberty Mutual Co., 330 U.S. 469, 479 (1947).

[7] Hackley-Phelps-Bonnell Co. v. Industrial Comm., 165 Wis. 586, 162 N.W. 921 (1917).

ordinary working hours.[8] It has become so well recognized today, as to be almost axiomatic in compensation law.[9] Thus the courts declared that the line of demarcation between compensability and non-compensability should be the premises of the employer where the workman must perform his duties. One of the most commonly accepted reasons given for this choice is that once the worker is on such premises, he is then "under the master's control and subject to his direction."[10]

The second basic rule, a corollary of the first, holds rather categorically that injuries incurred by a workman while going to or coming from work are not compensable.[11] The theory upon which this rule is based is that injuries incurred while going to or coming from work arise out of the ordinary hazards which are faced by all travelers and which are unrelated to the business of the employer.[12] It is generally held that there is no liability if the injury arises from a peril which is common to all mankind or to which the public at large is exposed.[13] A survey of the case law on the subject reveals the generally accepted rule to be that unless the employment premises have been reached, an injury incurred while going or coming is not compensable. The Wisconsin Legislature made this judicially created rule, a statutory rule.[14]

In the early days of compensation law, the courts adhered very strictly to the premises rule. There later developed a definite trend in the decisions away from such strict interpretation.[15] There have now developed in the law certain recognized exceptions under which injuries incurred off the employment-premises may yet be compensated. Although considered as exceptions, they have become so well recognized and accepted as to be quite as well known as the rules themselves. Because of the exigencies of the language these exceptions must be presented as separate principles yet they should be considered as a composite principle since none are mutually exclusive. All spring from the theory that the course of employment should be extended to any injury

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[8] Doyle v. Penton Lumber Co., 56 So. 2d 774, 776 (La. 1952).
[9] 71 C. J. WORKMEN'S COMPENSATION §438 (1).
[10] Milwaukee v. Althoff, 156 Wis. 68, 145 N.W. 238 (1914).
[11] 71 C. J. WORKMEN'S COMPENSATION §443 (11) and cases cited at pp. 718, 719; 49 A.L.R. 411 (1927).
[12] Voehl v. Indemnity Insurs. Co., 288 U.S. 162 (1933).
[13] See Note 28 R.C.L. 804 (1921).
[14] See Wis. Laws (1913), ch. 599 "Every employe going to and from his employment in the ordinary and usual way, while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment . . ."
[15] See Tinsman Mfg. Co. v. Sparks, 211 Ark. 559, 201 S.W. 2d 573 (1947) "There is an ever growing tendency to construe the Act liberally to allow compensation."—The court refused to follow strict cases cited: Texas Employers' Ins. Ass'n. v. Holmes, 145 Tex. 158, 196 S.W. 2d 390, 394 (1946); Roger's Case, 318 Mass. 308, 61 N.E. 2d 341 (1945); *Contra:* Simpson v. Lee & Cady, 294 Mich. 460, 293 N.E. 718 (1940).

where the employee is within that range of danger which is associated with the employment.[16]

II. The Exceptions

An injury may be compensable, although incurred while off the premises of the employer, if:

A. *The Employer Supplies the Transportation*

This is perhaps one of the most common and most universally adopted exceptions to the general rule. It is generally held that when the employer furnishes the transportation, liability is thereby extended to any injury incurred while the employee is being so transported.[17] In at least one jurisdiction,[18] compensation is awarded where the transportation is supplied either because of contract or because of custom and usage. The majority of courts restrict such coverage to cases where there is a contractual obligation upon the employer to furnish such transportation.[19] This obligation on the employer, however, often need not be expressed but may be implied.[20]

Compensability is not dependent upon the mode of transportation.[21] Awards have been sustained where the transportation was public;[22] private;[23] under a car-pool plan;[24] the employee's personal vehicle;[25] or even where the employee was injured while waiting for employer-supplied transportation.[26]

B. *The Employee Is on a Special Errand or Mission*

Where an employee is injured off the employment-premises but while engaged in a special errand or mission at the request or order of his employer, the courts will generally award compensation.[27]

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[16] 1 Larson, The Law of Workmen's Compensation 194 (1st ed. 1952).

[17] The reason compensation is allowed is generally stated to be that while an employee is being transported by his master he is considered to be still within the master's protection and control. *Cf.* Milwaukee v. Althoff, *supra,* note 10.

[18] Pearson v. Aluminum Co., 23 Wash. 2d 403, 161 P. 2d 169 (1945).

[19] Cardillo v. Liberty Mutual Co., *supra,* note 5; New York Casualty Co. v. Wetherell, 193 F. 2d 881 (5th Cir. 1952); Rock County v. Industrial Comm., 185 Wis. 134, 200 N.W. 657 (1924); Geldnich v. Burg, 202 Wis. 209, 231 N.W. 624 (1930); Goldsworthy v. Industrial Comm., 212 Wis. 243, 248 N.W. 427 (1933).

[20] Donovan's Case, 217 Mass. 76, 104 N.E. 431 (1914); Western Fruit Co. v. Industrial Comm., 206 Wis. 125, 238 N.W. 854 (1931).

[21] Cardillo v. Liberty Mutual Co., *supra,* note 5.

[22] City of San Francisco v. Indust. Acc. Comm., 61 Cal. App. 2d 248, 152 P. 2d 760 (1943).

[23] Rock County v. Industrial Comm., *supra,* note 19.

[24] Employers' Mut. Liab. Ins. Co. of Wis. v. Konvicka, 99 F. Supp. 433 (S.D. Tex. 1951); Texas Employers Ins. Assoc. v. Inge, 146 Tex. 347, 208 S.W. 2d 867 (1948); *But see* Charney v. Industrial Comm., 249 Wis. 144, 23 N.W. 2d 508 (1946) Where though the employer knew and approved of plan, he didn't have any duty to transport nor did he contribute to its cost.

[25] Williams v. Travelers Ins. Co., 19 So. 2d 586 (La. App. 1944).

[26] Radermacher v. St. Paul City Rwy. Co., 214 Minn. 427, 2 N.W. 2d 466 (1943); Ward v. Cardillo, 135 F. 2d 260 (D.C. Cir. 1943).

[27] 71 C. J. Workmen's Compensation, §442.

The cases of salesmen who are usually off the employment-premises fall within this classification, but this discussion is limited to inside-workers who are so injured. It has been held that the receipt of pay or the absence thereof for such a mission is immaterial,[28] however, it seems clear that should an employee receive extra pay for such a mission it would be material to show the employee's purpose in being where he was when injured.

If an employee is injured while on a special errand which is undertaken solely for a business purpose, there is no difficulty in applying the above rule. That situation changes, however, if the employee is engaged in a personal as well as business errand. In what is considered to be the leading case on this problem,[29] a plumber's helper promised to pick up his wife in a nearby town after he had finished work for the day. His employer, hearing this, asked the helper to do some work for him while in that town. While on his way to pick up his wife and perform the designated tasks, the helper was killed in an automobile accident. A claim for compensation on the ground that the helper was engaged in a special errand for his master was denied. The court also denied recovery under the Dual Purpose Doctrine. In substance the doctrine holds that an injury during a trip serving both a business and personal purpose is compensable, if the trip involves such a service to the master that the business trip would have to be made by someone even though the personal trip were not made. This doctrine has been given a broad application.[30]

The Special Errand Rule is affected by the deviations or detours of the employee. In *Barrager v. Industrial Commission,*[31] the Wisconsin Court said:

> ". . . it is essential, by some process or other, to determine whether, at the outset, the trip in question was that of the employer, or that of the employee. . . . In case it is the employer's trip, and there are any detours for purely personal objectives, such detours must be separated from the main trip and the employee held to be outside the scope of his employment during such detour."

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[28] Hartford Acc. Indemnity Co. v. Bond, 199 S.W. 2d 293, 297 (Tex. Civil App. 1947).

[29] Marks v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929).

[30] Desmond, *Arising out of and in the course of employment,* 26 NOTRE DAME LAW. 462, 464 (1950); Locke v. Steele County, 223 Minn. 464, 27 N.W. 2d 285 (1947); Gritsche v.O'Neille, 147 Pa. Super. 153, 24 A. 2d 131 (1942); Benjamin H. Sanborn Co. v. Industrial Comm., 405 Ill. 50, 89 N.E. 2d 804 (1950); Bradley v. Dangis Pharmacy, 5 N.J. Super. 330, 69 A. 2d 36 (1949); Ruckgaber v. Clark, 131 Conn. 341, 39 A. 2d 881 (1944); *See* Barragar v. Industrial Comm., 205 Wis. 550, 238 N.W. 368 (1931).

[31] 205 Wis. 550, 238 N.W. 368 (1931).

In *Simons v. Industrial Commission,*[32] the court defined a detour of that nature thus:

> "The test is whether the servant has stepped aside from the business of his principal to accomplish an independent purpose of his own, or whether he was actuated by an intent to carry out his employment and to serve his master."

On the other hand, if at the outset, the trip was not that of the employer, such as where an employee is asked to perform a special errand for his master while on the way to or from work, or at least while making some customary trip, then the converse of this rule is applied. Under such circumstances, it is generally held that the employee must have deviated from his normal route of travel before the injury occurs, otherwise it is not compensable.[33]

C. *The Employee Is Subject to Call at the Time of Injury*

Most states recognize the principle that workers who are subject to call are protected by the compensation acts during such period.[34] Because of the inconveniences and continuous duties involved in such a situation, the rule seems quite reasonable. In one case, a nurse on twenty-four hour call became nervous and distraught. While cycling to calm herself at the suggestion of her employer, she was injured and recovery was allowed.[35] The rule has also been applied in the case of a housemother injured on a public street while shopping both for herself and for her students.[36] In an early Wisconsin case,[37] an employee who was on twenty-four hour call, was injured by a blast when he was not on duty, but was purchasing groceries at a general store located on the employment premises. In denying his claim which was based on this exception, the court said:

> "But to include the acts of an employee when off duty and when attending to business pertaining strictly to his own personal affairs . . . would be to enlarge the meaning of the statutory words beyond their reasonable import. . . ."

It would seem that under the Wisconsin decision, many of the cases to which the Subject-to-Call principle is applied would not be compensable, unless they could be classed under one of the other exceptions.

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[32] Simmons v. Industrial Comm., *supra,* note 7.
[33] Bennett v. Marine Works Inc., 273 N.Y. 429, 7 N.E. 2d 847 (1937); Automotive P. & G. Co. v. Industrial Comm., 220 Wis. 122, 264 N.W. 492 (1936); Marks v. Gray, *supra,* note 29. But see Bitker Cloak and Suit Co. v. Industrial Comm., 241 Wis. 653, 6 N.W. 664 (1942).
[34] 71 C. J. WORKMEN'S COMPENSATION, §457.
[35] Clapham v. David, 232 App. Div. 458, 251 N.Y.S. 245 (1931).
[36] Smith v. University of Idaho, 67 Idaho 22, 170 P. 2d 404 (1946).
[37] Brienen v. Wis. Public Service Co., 166 Wis. 24, 163 N.W. 182 (1917).

D. *The Employee Receives Wages for Travel Time*

The rule in many jurisdictions is that injuries incurred while going to or coming from work are compensable if the employee is paid for the time so consumed.[38] This exception falls within the principle often utilized by the courts in extending coverage where the employer has control of the employee when injured. Where wages are being paid to a worker for his travel time, it would seem that a present employment relation exists; a worker is rarely paid for time during which the employer considers him to be off-duty. On the other hand, it is generally held that the absence of wages is immaterial to the question of employment.[39] The Wisconsin court, along with several other jurisdictions, does not accept this rule.[40]

E. *The Employee Is Working at Home or Is Enroute There*

Although this rule is peculiarly applicable to salesmen and other off-premises employees, it is also applicable to those who normally work on the premises. Stated succinctly the rule is:[41] Injuries incurred in the employee's own home are generally compensable if the work is being performed there pursuant to contract or to the employer's directions, but not compensable if it is for his own convenience or benefit that he voluntarily performs the work in his own home. In *Eckhardt v. Industrial Commission*,[42] compensation was denied to a claimant who was injured in her own apartment above her employer's store. Claimant was in the process of going down to the store for a missing paper, necessary to complete a report for her employer, when injured. The court refused compensation because claimant did such work at home as a matter of convenience rather than necessity.

III. The Proximity Rule

In addition to the exceptions already noted and discussed, there is another rule which the courts have developed to extend the basic rules of compensability:

> "We are constrained to hold that the term 'premises of his employer' as used in this statute should not be construed to be limited to the soil over which he has legal dominion or title, but to that which he uses to all intents and purposes as his premises."[43]

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[38] See Kobe v. Indust. Acc. Comm., 35 Cal. 2d 33, 215 P. 2d 736 (1950).
[39] Cardillo v. Liberty Mutual, *supra*, note 5.
[40] Hornburg v. Morris, 163 Wis. 31, 157 N.W. 556 (1916). There are many holdings to the effect that mere payment of transportation costs is not sufficient, but there must be something more; See Notes, 20 A.L.R. 319 (1922); 49 A.L.R. 454 (1927); 63 A.L.R. 469 (1929); 87 A.L.R. 250 (1933); 100 A.L.R. 1053 (1936).
[41] 58 Am. Jur., Workmen's Compensation, §216.
[42] 242 Wis. 325, 7 N.W. 2d 841 (1943). *But cf.* Githens v. Industrial Comm., 220 Wis. 658, 265 N.W. 662 (1936).
[43] Northwestern Fuel Co. v. Industrial Comm., 197 Wis. 48, 221 N.W. 396 (1936).

In this case, an employee was injured while riding his bicycle home from work. The injury occurred on a public street which was adjacent to the employment-premises. The street was used by the employer for parking his equipment and was also partially kept in repair by him. The court held that the street was so closely associated with the work-premises as to be in effect a part of them.

In addition to injuries occurring near or adjacent to the work-premises the rule has been applied to injuries incurred in gaining access or egress to the premises.[44] In *Cudahy Packing Co. v. Parramore*,[45] an award was sustained where the employee on his way to work was killed at a railroad crossing. The employment-premises which were located outside of town, could only be reached by driving out a public highway and then taking a public sideroad to the plant. This sideroad was intersected by a series of railroad tracks near the plant, and it was there the employee was killed. The court held that since this was the only practical approach to the plant, the employees were in effect invited by their employers to use this route. The case was clearly based on the proximity rule. In a similar decision,[46] the Supreme Court again based its ruling on this principle. Here, the plant was located along a railroad right of way which was customarily used by the employees when entering or leaving the plant. Claimant in this case lived across the right of way from the plant between two roads which ran perpendicular to the tracks. Instead of following a circuitous route along the road, claimant often followed a direct route from his house, across the right of way to the plant, and it was there that he was struck by a train. The court sustained an award on the ground that the use of the right of way was well known to the employers and not objected to by them. The court said:

> "Probably as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer."

This so-called proximity rule has been applied in a wide variety of other cases such as to injuries incurred on adjacent public walks.[47]

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[44] See Note 28 A.L.R. 1413; Dinsmore v. Bath Iron Works, 143 Me. 344, 62 A. 2d 205 (1948); Milwaukee v. Industrial Comm., 185 Wis. 311, 201 N.W. 240 (1924).

[45] 263 U.S. 418 (1923).

[46] Bountiful Brick Co. v. Giles, 276 U.S. 154, 158 (1928).

[47] Barnett v. Britling Cafeteria Co., 225 Ala. 462, 143 So. 813 (1932) "A workman might be . . . so close to the scene of his labor within its zone, environments and hazards as to be in effect at the place and under the protection of the statute."

Although the Wisconsin Court in the case of *Northwestern Fuel Co. v. Industrial Commission*[48] expressed the more liberal attitude on off-premises injuries, a subsequent decision substantially modified this view. In *Krebs v. Industrial Commission*[49] the court construed the 1913 amendment[50] of the Compensation Act by saying its purpose was to make compensable injuries going and coming only while *on the premises* of the employer. In this case, the claimant was denied recovery for injuries incurred while walking to work on a public sidewalk only twenty feet from the entrance to his place of work. The court said:

> "The terms of the amendment should not be stretched by forced construction to include situations not clearly within their intendment."

This decision does not overrule the *Northwestern Fuel case* because it is distinguishable on the facts, but it does limit the liberality of the first ruling. In a later case,[51] compensation was denied to a workman who was injured while crossing an adjacent field customarily used by the plant's employees as a short-cut on their way to work. The trend of the decisions in other states is to recognize and apply the proximity rule to adjacent public walks and ways more liberally.[52]

The courts are not in agreement as to how far compensability should extend under this doctrine. One view states that coverage should be extended for a reasonable time and a reasonable distance beyond the work hours and premises.[53] Other courts have set forth the proposition that once a causal connection between the injury and the conditions necessarily facing the worker in entering or leaving the work-premises is established, then compensation should be awarded.[54] Of the two, the latter view is probably the more practical and more certain approach.

IV. Conclusion

There is present in the law today, a clear trend to increase the number of exceptions to the basic Industrial Premises and Going and Coming Rules in order to broaden the coverage of the Compensation Acts. This trend in the law is explained by the same economic factors that brought about the enactment of the first Compensation Act, namely to provide suitable relief and aid to injured employees. Such a trend

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[48] *Supra,* note 43.
[49] 200 Wis. 134, 227 N.W. 287 (1929).
[50] *Supra,* note 14.
[51] International Harvester Co. v. Industrial Comm., 220 Wis. 376, 265 N.W. 193 (1936).
[52] Bales v. Service Club No. 1, 208 Ark. 692, 187 S.W. 2d 321 (1945); Flanagan v. Ward Leonard Co., 274 App. Div. 1081, 85 N.Y.S. 2d 649 (1949); Freire v. Matson Navigation Co., 19 Cal. 2d 8, 118 P. 2d 809 (1941).
[53] Horovitz, Current Trends In Workmen's Compensation 676 (1947).
[54] 1 Larson, *supra,* note 16 at 201.

is in line with the policy of economic security for laboring people that is prominent today.

In many phases of the law under discussion, the Wisconsin decisions appear a little less liberal than those which express the current trend. A significant reason for this might be found in the more explicit wording of the Wisconsin Act, which allows less interpretive freedom to the courts than the broader and more vague statutes of some of the more liberal states.

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