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Workmen's Compensation -- Accidents Arising Out of and in the Course of Employment of Traveling Employees

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Workmen's Compensation—Accidents Arising Out of and in the Course of Employment of Traveling Employees

The question of the extent of coverage afforded traveling employees under workmen's compensation laws was raised in the recent case of *Hartford Accident & Indemnity Co.* v. *Thornton.*[1] The decedent, a traveling salesman, had registered at an Athens hotel and had made several business visits in the city before returning thereto. As was his custom when in Athens, he ate at a cafe several doors from the hotel on the opposite side of the street. Due to a rainstorm the street surface was slippery; and deceased, in returning to the hotel, fell and sustained injuries from which he died. The Court of Appeals reversed the superior court's affirmation of an award by the industrial board to the deceased's widow. The reversal was based on the conclusion that the deceased had finished his day's work at the time of the accident and was returning from a mission of his own, so that he was not engaged in fulfilling any of the duties of his employment or doing anything incidental thereto, and the accident causing death could not be said to have arisen "out of and in the course of the employment."

As difficult of application and definition as are the terms "out of" and "in the course of" when measuring the propinquity of the ordinary worker to the pursuit of the objects of his employment, even more ethereal become unqualified instances of application when the claimant's occupation is that of traveling employee. The discretionary powers granted such employees and the extended area in which they conduct their activities give to them certain characteristics smacking of the nature of independent contract. However, having concluded that these employees are encompassed by the act, the courts have assumed the burden of making the ultimate finding of whether, as a matter of law, the specific employee is injured in an accident "arising out of and in the course of the employment." These findings, even when weighed by the variant wording of the different statutes, have not always been consistent.

Granting that the traveling salesman, while in his own home and pursuing none but his own ends, is outside the act, and assuming that his intention in undertaking a journey is to do an act in furtherance of his employer's business, the question arises as to the point in the journey at which the act will undertake to give protection. In *Green* v. *Hiestand Bros.*,[2] compensation was allowed by the Pennsylvania court where the employee was found dead in his private garage of monoxide poisoning, the circumstances showing that he had been repairing his car preparatory to calling on customers. The decedent

[1] ——Ga. App. ——, 31 S. E. (2d) 115 (1944).
[2] 103 Pa. Super. 515, 157 Atl. 44 (1931).

owned the car but was compensated by his employer for its use on company business. A later Pennsylvania decision followed the *Green* case, *supra,* under a similar fact situation where the employee was provided with the car by his employer.[3]

The New York Court of Appeals announced the New York doctrine in *Harby* v. *Marwell Bros.*[4] The decedent had been killed while going with his sample case from his home to take a train to visit his customers. In affirming an award the court held that a traveling man begins his work when he leaves his home or the place where he lives or passes the night to visit directly a customer. A Nebraska decision[5] followed the same line of reasoning in allowing compensation where the decedent was killed while crossing the street from his home office toward a taxi stand for the purpose of hiring a taxi to take him to the railroad station where he was to catch a train for a business trip.

A number of states, however, Massachusetts being particularly notable among them, have refused compensation for injuries incurred from "street risks" while the traveling employee is upon a public thoroughfare. The principle, as announced in *Donahue's Case,*[6] is to the effect that an injury to an employee, suffered while on a public thoroughfare, does not arise out of the employment, even though the employee is called upon to use the street in the performance of his work; that the risks of such injuries are common to everyone traveling the highway, whether employed or unemployed, and are not peculiar to the employment. This rule was followed by the Massachusetts court in a number of cases,[7] until the state legislature amended the workmen's compensation provisions of the state in 1927 to include compensation for injuries sustained through ordinary street risks.[8] It is interesting to note that before this legislative action the same court followed the street risk doctrine and denied compensation in *Braley's Case,*[9] after having failed to apply it just one year earlier in *Moran's Case,*[10] where the injury resulted from the employee's attempting to board a street car. The court announced that the cases were distinguishable, but failed clearly to distinguish them. Had we to depend on the authority

[3] Beck v. Ashton, 124 Pa. Super. 307, 188 Atl. 368 (1936).

[4] 203 App. Div. 525, 196 N. Y. Supp. 729 (1922); *cf.* Kowalek v. New York Consol. R. Co., 229 N. Y. 489, 128 N. E. 888 (1920).

[5] Kirkpatrick v. Chocolate Sales Corp., 127 Neb. 604, 256 N. W. 89 (1934).

[6] 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215, (1917) (Salesman was injured in fall on icy street.).

[7] Blakely's Case, 252 Mass. 212, 147 N. E. 576 (1925) (fell on icy street); Whitley's Case, 252 Mass. 212, 147 N. E. 576 (1925) (slipped on icy surface); Braley's Case, 237 Mass. 105, 129 N. E. 420 (1921) (turned and broke ankle while leaving street car); Hewitt's Case, 221 Mass. 1,113 N. E. 572, L. R. A. 1917B, 249 (1917) (traveling in car which overturned).

[8] MASS. ANN. LAWS (Michie, 1942) c. 152 §26.

[9] 237 Mass. 105, 129 N. E. 420 (1921), cited *supra* note 7.

[10] 234 Mass. 566, 125 N. E. 591 (1920); *accord,* Cook's Case, 243 Mass. 572, 137 N. E. 733 (1923).

of these cases alone, we would be faced by the paradoxical situation of traveling employees being protected by the Workmen's Compensation Act while boarding street railway cars, but assuming the risks attendant to debarking therefrom, regardless of the fact that both actions were undertaken pursuant to the employment. Fortunately, the legislative amendment has precluded any such anomaly.

The Indiana,[11] Illinois,[12] and Wisconsin[13] courts have allowed compensation for injuries to traveling employees through street accidents, but the neighboring jurisdiction of Michigan, in *Hopkins* v. *Michigan Sugar Co.*,[14] chose to apply the earlier Massachusetts view in regard to street risks.[15]

Unlike the "street risk" cases just dicussed, where the employee is unquestionably on the streets in the performance of his duties, there is a class of cases which, like the principal case, raises the question whether the employee, when injured, was fulfilling the duties of his employment or doing anything incidental thereto, so that the injury can be said to have arisen "out of and in the course of the employment."[16] In determining the status of the employee at the time of the injury, many extrinsic factors must be taken into consideration, such as the location of the accident,[17] the time of its occurrence, the condition of the employee at the time of the accident, whether he was acting in a manner which the employer might reasonably contemplate, and

[11] Capital Paper Co. v. Conner, 81 Ind. App. 545, 547, 144 N. E. 474, 475, (1924) (Salesman struck by street car while crossing street. "The mere fact that the hazard is one to which every person on the street is exposed is not sufficient to defeat compensation."); *In re* Harraden, 66 Ind. App. 298, 301, 118 N. E. 142, 144 (1917) (slipped on icy sidewalk. "While the conditions produced by the weather may in a sense affect all alike in the particular vicinity, yet the fact remains that a person so employed is much more exposed to such hazards than the public generally because of the duties enjoined upon him by his employment and the place or places to which he must necessarily go in the discharge of such duties.").

[12] J. E. Porter Co. v. Industrial Commission, 301 Ill. 76, 133 N. E. 652 (1922) (struck by automobile while boarding street car).

[13] Schroeder & Daly Co. v. Industrial Commission of Wisconsin, 169 Wis. 567, 569, 173 N. W. 328, 329 (1919) (Salesman slipped and injured leg. "The fact that others may be exposed to like risks does not change the character of the risk to which applicant was exposed.).

[14] 184 Mich. 87, 90, 150 N. W. 325, 327 (1915) (Salesman fell on ice while hurrying to meet street car. "One of the most common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally, irrespective of employment."). *But cf.* Redner v. H. C. Faber & Son Co., 233 N. Y. 379, 119 N. E. 842 (1918) (Employee fell while crossing street between two establishments owned by defendant.).

[15] For a more complete discussion of street risks see HOROVITZ, WORKMEN'S COMPENSATION (1944) 95-99; NOTES (1931) 80 A. L. R. 126; (1918) 15 N. C. C. A. 294.

[16] Brown, *Arising out of the Employment* (1931-32) 7 WIS. L. REV. 15 and 67; (1933) 8 WIS. L. REV. 134 and 217.

[17] Clegg v. Motor Finance Corp., 20 N. J. Misc. 437, 28 A. (2d) 533 (Work. Comp. Bd. 1942) (Compensation allowed where auto repossessor, failing to locate defaulting purchaser of car, drove thirty miles beyond to visit wife, and was injured while returning and before he had reached home of purchaser.).

whether the acts were done principally in furtherance of his employer's business or for his own benefit.[18]

Cases are numerous where compensation has been allowed for injuries and death suffered by employees with exceptionally wide discretionary powers in the performance of acts far beyond what might usually be thought of as the ordinary scope of employment of a traveling employee. Thus, in *Southwestern Portland Cement Co.* v. *Simpson,*[19] where the decedent was killed in the early hours of the morning while driving to a night club, compensation was found proper in view of the fact that the decedent's duties included fraternizing with prospective customers whenever and wherever possible, and it was established that his intention in going to the night club was for that purpose. Where a sales supervisor attended a banquet and party at the request of his employer, leaving at 3:30 A.M. in a car furnished him by the employer, but, instead of going home, parked in front of the employer's establishment and fell asleep, the New Jersey Commission allowed an award for his death by drowning, caused when the car rolled away into a canal nearby.[20]

An unusually liberal award was made by the Pennsylvania court in *Baumann* v. *Howard J. Ehmke Co.*[21] The decedent there, whose territory embraced the entire United States, sold fruit pickers' bags and followed the fruit crops. He had completed his sales for the Washington apple season and was staying for a few weeks on the farm of a friend, awaiting the ripening of the California orange crop, which fact was known to his employer. While watching his friend split a tree, decedent was struck by a flying chip from a wedge, and died as a result of blood poisoning contracted therefrom. The court stated that from the time the salesman departed from the employer's office in Philadelphia until he reported there on the completion of his trip he was actually engaged in the employer's business unless he did something to break the employment. This unbounded latitude is not typical of many jurisdictions, although the New York court allowed a recovery for the death from malaria of a traveling salesman who, while on a sales trip in South Africa, was bitten by a mosquito.[22] The court held

[18] Solar-Sturges Mfg. Co. v. Industrial Commission, 315 Ill. 352, 146 N. E. 572 (1925) (Struck while crossing street from cigar store to establishment of prospective customer to whom he intended giving cigars just purchased. Award allowed); *accord,* Parrish v. Armour & Co. 200 N. C. 654, 158 S. E. 188 (1931) (on way to buy cigars for customer when injured).

[19] 135 F. (2d) 584 (C. C. A. 10th, 1943).

[20] Rafferty v. Dairymen's League Co-op Assn., 16 N. J. Misc. 363, 200 Atl. 439 (Work. Comp. Bd. 1938).

[21] 126 Pa. Super. 108, 190 Atl. 343 (1937).

[22] Lepow v. Lepow Knitting Mills, 288 N. Y. 377, 43 N. E. (2d) 450 (1942); *see* Marks' Dependents v. Gray, 251 N. Y. 90, 93, 167 N. E. 181, 182 (1929) (". . . the decisive test must be whether it is the employment or something else which sent the traveler forth upon the journey or brought exposure to its

that the decedent was sent to South Africa upon a mission arranged by his employer solely to promote its business interests, and that the risks incidental to his itinerary through regions infested by a death-bearing insect were special in character, related to his employment, and were not his own.

The nature of their employment requires many traveling employees to seek food and lodging in localities to which their duties take them. A nice question, and one that finds varied answers in numerous jurisdictions, is whether injuries incurred while in restaurants or hotels, rooming houses and the like are compensable as arising out of and in the course of the employment. Where the employee, stopping at a hotel or rooming house, has suffered injury or death as the result of fire breaking out in the building, the courts have generally allowed compensation.[23] In a California case, *Forman* v. *Industrial Accident Commission*,[24] however, where the claimant, a real estate salesman, had been sent to a town for the purpose of securing customers when and where he could, and had been instructed to stay there indefinitely, the court refused compensation for burns suffered when the hotel in which he was living caught fire, contending that at the time of the fire the employee was not performing services growing out of and incidental to the employment and acting within the course of his employment as such. The Minnesota court in *Stansberry* v. *Monitor Stove Co.*[25] distinguished that case from the *Forman* case in that in the latter the representative was quartered at the hotel for an indefinite time, and was not a mere overnight guest.

Where death results from suffocation or asphyxiation caused by the escape of noxious fumes from heating or lighting equipment in hotel rooms or tourist cabins, the courts are usually in agreement. The Texas court[26] affirmed an award where the decedent, a traveling collector, engaged a tourist cabin on a November night, and was later found dead of monoxide poisoning, the windows and doors of the cabin being closed and the gas heater turned on. In an identical fact situation,

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perils."); Katz v. Kadans & Co., 232 N. Y. 420, 421, 134 N. E. 330, 331 (1922) ("If the work itself involves exposure to the perils of the street, *strange, unanticipated, and infrequent though they may be,* the employee passes along the street when on his master's occasions under the protection of the statute.") *(Italics ours).*

[23] Standard Oil Company (Kentucky) v. Witt, 283 Ky. 327, 336, 141 S. W. (2d) 271, 275 (1940) ("It was certainly and necessarily in the contemplation of the parties that there would be periods of rest and sleep as essential incidents of the employment. . . ."); Souza's Case, —— Mass. ——, 55 N. E. (2d) 611 (1944); Thiede v. G. D. Searle & Co., 275 Mich. 108, 270 N. W. 234 (1936); Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N. W. 977 (1921); Texas Employers' Insurance Assn. v. Harbuck, 73 S. W. (2d) 113 (Tex. Civ. App. 1934).

[24] 31 Cal. App. 441, 160 Pac. 857 (1916).

[25] 150 Minn. 1, 183 N. W. 977 (1921), cited, *supra,* note 23.

[26] Texas Employers' Insurance Assn. v. Cobb, 118 S. W. (2d) 375 (Tex. Civ. App. 1938).

where the accident happened in the month of January, the California court[27] allowed compensation, saying that commercial travelers may be regarded as acting in the course of their employment so long as they are traveling in their employer's business, including the whole period of time between their starting from and returning to their place of business or home. The Indiana court[28] allowed compensation where a truck driver was asphyxiated by gas from a tourist cabin heater. The court made no mention of the unreasonableness of the decedent's actions, although it appears that he had secured all the windows and doors, the temperature being two degrees below zero.

The courts have allowed recoveries where a traveling employee fell from a hotel porch,[29] and where a traveling salesman fell downstairs in a home in which he had been invited to spend the night and in which he had undertaken to perform some of the duties of his employment.[30] But no recovery was had where the employee fractured his leg in a tourist cabin shower,[31] was scalded in a hotel bath room when he slipped and grabbed the shower lever as he fell,[32] bled to death from a cut suffered in a fall on the stair of a rooming house at four o'clock Sunday morning,[33] or fell from the stage of a Y.W.C.A. auditorium while being shown to her room in the dark.[34]

A majority of the courts hold that eating is a mere necessity to human life and not an incident of the employment. Under this theory no award was made where a traveling salesman stopped at a public restaurant, and during the course of the meal a chicken bone became lodged in his throat, necessitating medical treatment,[35] an insurance collector and solicitor, entering a restaurant to eat, fell down a flight of stairs while looking for a washroom,[36] or contracted typhoid fever from food served by a carrier in a town to which he had been sent to sell goods.[37] Where compensation has been allowed, the court has

[27] California Casualty Indemnity Exchange v. Industrial Accident Commission, 5 Cal. (2d) 185, 53 P. (2d) 758 (1936).

[28] Lasear Inc. v. Anderson, 99 Ind. App. 428, 192 N. E. 762 (1934). *But cf.* Kass v. Hirschberg, Schutz & Co., 191 App. Div. 300, 181 N. Y. Supp. 35 (1920).

[29] Employers' Liability Insurance Co. v. Warren, 172 Tenn. 403, 112 S. W. (2d) 837 (1938).

[30] Cowles v. U. S. Rubber Products, 254 App. Div. 123, 4 N. Y. S. (2d) 811 (1942).

[31] Gibbs Steel Co. v. Industrial Commission, 234 Wis. 375, 10 N. W. (2d) 130 (1943).

[32] Davidson v. Pansy Waist Co., 240 N. Y. 584, 148 N. E. 715 (1925) (used the hotel room to display line of merchandise).

[33] Wilson v. L. M. Berry & Co., 149 Pa. Super. 492, 27 A. (2d) 721 (1942); *cf.* Turner v. Cathedral Publishing Co., 268 N. Y. 656, 198 N. E. 542 (1935).

[34] Jakeway v. John V. Bauer Co., 218 App. Div. 302, 218 N. Y. Supp. 193 (1926).

[35] Barron v. W. W. Norton & Co., 264 App. Div. 802, 34 N. Y. S. (2d) 740 (1942).

[36] Goldman v. John Hancock Mutual Life Ins. Co., 276 N. Y. 582, 12 N. E. (2d) 587 (1937).

[37] Johnson v. Smith, 263 N. Y. 10, 188 N. E. 140 (1933).

justified its action on the grounds that the employee, after entering the restaurant, did some act or acts in furtherance of the employment.[38]

The Texas court in *Wynn* v. *Southern Surety Co.*,[39] under a parallel fact situation to the principal case, denied recovery and announced a somewhat blanket rule on injuries of this type. "A traveling salesman, while eating his meals, or sleeping at hotels, or attending church or theatres, or going on private picnics or errands for his own pleasure or profit, is not, within the contemplation of the Workmen's Compensation Act, engaged in his employer's business, and an injury received by him while performing said acts or engaged in said recreation is not, within the purview of said law, an injury received 'in the course of the employment.' "[40]

There seems to be little likelihood of any extension of the protection afforded employees of this type within the jurisdiction of the Georgia court, for it is said in the principal case,[41] "To hold that there was a causal connection between the employment and the injury in this case, which is necessary to sustain the award, would be the equivalent of holding that a traveling salesman while away from home or headquarters, is in continuous employment, and that any accident which he may suffer arises out of and in the course of his employment. We do not understand that to be the rule in Georgia." It is submitted that the application of such a rule would be unwise in any jurisdiction.

The reader will note that all cases cited have involved persons who were clearly employees, and that no attempt has been made to digest cases deciding the question of whether the particular claimant's status was actually that of employee, or whether his particular characteristics marked him as an independent contractor. This discussion was omitted for the sake of brevity, but it would be error to make no mention whatsoever of the situation as it does exist.

The true traveling salesman is somewhat of a hybrid among employees. The unique status which he occupies is a result of the fact that the very movements which bring him closer and closer to the unprotected realm of independent contractor, that is, the extension and enlargement of his freedom of action and area of activity, operate at the same time to give him ever-extending protection until such time as he oversteps the vague bounds of employment into the category of inde-

[38] Employers' Liability Assurance Corp. v. Pruitt, 63 Ga. App. 149, 10 S. E. (2d) 275 (1940) (entered cafe to inquire as to whereabouts of prospective customer and fell from stool after eating a meal therein); Everard v. Woman's Home Companion Reading Club, 234 Mo. App. 760, 122 S. W. (2d) 51 (1938) (stepped on splinter while leaving lunchroom after eating meal with superior, discussing afternoon's work, and writing out order solicited earlier in the day).

[39] 26 S. W. (2d) 691 (Tex. Civ. App. 1930) (salesman struck by car while returning to hotel from restaurant).

[40] *Id.* at page 693.

[41] Hartford Accident & Indemnity Co. v. Thornton, —— Ga. App. ——, 31 S. E. (2d) 115, 117 (1944).

pendent contract. The view of the Georgia court was that, while the traveling employee can be classified as an employee, he must be treated as such. Thus, as it was stated in the *Thornton* case, "The scope and range of a traveling man's territorial activity necessarily broadens the field of his employment, but in no other way is a traveling employee distinguished under the act from ordinary employees who do not have to travel in the performance of their work."[42]

In the final analysis the problem may be solved in either of two ways. The court may set a definite boundary line in each instance over which no traveling employee may step still clothed in the protective covering of the act, or the court must resolve that, as a matter of policy, all traveling employees, and perhaps employees of any nature, will be compensated for any and all accidental injuries arising in the course of activities in any way connected or associated with the employment, throwing the resultant burden on the employer who passes the increased operating expense on to the consumer of his product or services in the form of increased charges. What future courts will choose to do can only be surmised. It is clear that the present trend of the Georgia court is toward the former policy.

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Corporations—Withholding Charter Because No North Carolina Incorporator

Press reports of January 15 stated that the Secretary of State had refused "to issue the charter," i.e., to file the certificate of incorporation of an oil company and certify a copy because no incorporator was a resident of this state.[1] The obstacle was met by adding a North Carolina subscriber, presumably by issuing him one share of stock. The news story correctly stated that the North Carolina corporation law does not require any incorporator to be a resident[2] but does require one director to be and provides that all directors must be bona fide stockholders.[3] As the business of the corporation must be managed by its directors,[3a] this means that sooner or later there must be a North Carolina stockholder if the law is complied with. Nevertheless a corporation might be organized sometime in advance of entering upon active business[4] and there is nothing in the law to prevent it existing for that period without North Carolina stockholders. After the corporation is once organized, however, it might merely ignore the legislative direc-

[42] *Ibid.*

[1] Durham Sun (Jan. 15, 1945), P. ——, col. ——, *re:* Tidewater Petroleum and Gas Co.

[2] N. C. GEN. STAT. (1943) §55-2.

[3] *Id.* at §55-48. *Quaere,* what is meant by "bona fide."

[3a] *Ibid.*

[4] See Hammond v. Williams, 215 N. C. 657, 659, 3 S. E. (2d) 437, 439 (1939).