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Special Comments

THE 'OPERATING PREMISES' EXCEPTION TO THE GOING AND COMING RULE

BY RICHARD D. COOPER*

One of the most litigious events in workmen's compensation law occurs when the employee is traveling to or from work and is injured with some circumstances connecting his work with the time, place or occurrence of the accident. The conflict of the existence of a work connected circumstance and the fact that the risks of going and coming to and from work are related to all occupations and all non-occupational travel make it difficult to resolve whether such injuries should be compensable.

The purpose of this article is to review the decisions of the Kentucky Court of Appeals to determine how the Court disposes of such cases, and to suggest some guidelines which the Court might find useful in deciding such cases in the future.

THE EVOLUTION OF A DOCTRINAL APPROACH

The Workmen's Compensation Act of Kentucky requires that an employee must receive an injury "arising out of and in the course of his employment" in order to be compensable. These dual requirements have traditionally been construed as separate and independent requirements for compensation. In its initial interpretation of them, the Court of Appeals said:

The words, 'in the course of employment have reference to the time, place, and circumstances [activity], while the words 'arising out of' the employment relate to the cause or source of the accident. The terms 'out of' and 'in the course of' are

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not synonymous, and if either of these two elements is missing, there can be no recovery.2

The Court also adopted the general going and coming rule construction of this statutory phrase; i.e. an employee who is going to or coming from his employment is usually not then “in the course of [his] employment, hence an injury which occurs then is not compensable.”3 However, many exceptions have been applied to the going and coming rule,4 and one of the principle exceptions widely applied throughout the nation is that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have occurred “in the course of employment.”5

Making compensable those injuries which occur on the employer’s premises though the employee is going to or coming from work appears initially to be a definite, and therefore easily applied, rule. And where the premises are a single building it is easily applied, even to the steps where the employees and public alike enter and exit.6 However, this exception created great difficulty since the property of the employer may cover a large area, as is generally true with respect to coal mines. In its early decisions, the Court simply applied the premises exception without regard to the size of the premises, so that it was a compensable injury when an employee stumbled while going from the coal mine tipple where he worked to the company-owned house where he lived.7 This expansive application of the premises exception

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2 Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 280-81, 204 S.W. 152, 159-60 (1918).
3 Miracle v. Harlan-Wallins Coal Corp., 311 Ky. 169, 223 S.W.2d 738 (1949); Draper v. Railway Accessories Co., 300 Ky. 597, 189 S.W.2d 934 (1945); Porter v. Stoll Oil Refining Co., 242 Ky. 392, 46 S.W.2d 510 (1932).
5 See generally Annot., 82 A.L.R. 1043, 1044 (1933).
6 See e.g., Barres v. Watterson, 196 Ky. 100, 244 S.W. 308 (1922).
7 Wilson Berger Coal Co. v. Brown, 223 Ky. 183, 3 S.W.2d 199 (1928). See also Black Mountain Corp. v. Vaughn, 280 Ky. 271, 132 S.W.2d 938 (1939) (coal

(Continued on next page)
was seen as less than desirable and the Court thereafter groped for an alternative rule. The difficulty of this task was underscored by Larson's statement that "... if some other point between entering the premises and picking up the broom is to be the starting point, it is difficult to imagine how that point can be successfully defined."

There followed, therefore, a series of cases in which the Court reached sound results without being able to formulate the expression of a rationale both applicable to all those cases and sufficiently sound to be hardened into a repeated decisional basis. First, the Court continued to find presence on premises limited to a single building to afford compensation. However, in Harlan Collieries Co. v. Shell the Court reversed a grant of compensation to a coal miner injured in a truck accident while going from work though still on premises owned by his employer, saying that workmen's compensation laws are only "designed to indemnify the employee from financial loss resulting from exposure to industrial hazards." The Court refined this view in Clear Fork Coal Co. v. Roberts stating that the element required for compensability was that the employee be engaged in a work-connected activity when injured. In Roberts, as in Shell, the coal miner was traversing a road on the employer's premises. Rather than leaving, however, he was going to work after having dressed for his job at the company bath house. Having thus initiated his work, the ride was deemed a work-connected activity. This "work connected activity" approach, as distinguished from a pure "premises exception," not only permitted denying recovery to an employee on the employer's premises, as in Shell, it also had already allowed the granting of compensation by "extending the premises" beyond

(Footnote continued from preceding page)
miner killed riding on loaded cars from barn to head house); Harlan Gas Coal Co. v. Trial, 213 Ky. 226, 280 S.W. 954 (1926) (coal miner walking from bath house to place of work); and Big Elkhorn Coal Co. v. Burke, 206 Ky. 489, 267 S.W. 142 (1924) (coal miner killed while on way to outside of mine).

9 King v. Lexington Herald, 313 S.W.2d 423 (Ky. 1958). See also Jefferson County Stone Co. v. Better, 199 S.W.2d 986 (Ky. 1947) (nightwatchman killed in fire of his home furnished on the premises). But see Masonic Widows and Orphans Home v. Lewis, 330 S.W.2d 103 (Ky. 1959) (cleaning lady injured in furnished living quarters located away from area of her work).
10 229 S.W.2d 923 (Ky. 1951).
11 Id. at 926 (emphasis added). For other cases of injuries on large premises held not to be compensable, see Note, supra note 4, at 422 n. 14.
12 279 S.W.2d 797 (Ky. 1955).
the actual property line. In *Louisville and Jefferson County Air Board v. Riddle*,\(^3\) for example, compensation was awarded an employee for injuries sustained in crossing a highway to the gate of the airfield where he was employed. After alighting from the bus which he customarily rode to work, the employee, a maintenance man, would daily check landing lights maintained by his employer *before* crossing the road to work. He was consequently engaged in work connected activity before arriving on the actual premises and was thus then in the course of his employment. Thus, as these cases show, without yet evolving the appellation "operating premises," the Court had evolved the approach that would bear that name; that the crucial point of determining compensability is the nature, not the location, of the activity.

**THE EFFECT OF THE POSITIONAL RISK DOCTRINE**

The event which apparently marked the increased cogency of the Court's analysis was the celebrated decision in *Corken v. Corken Steel Products, Inc.*\(^4\) to adopt what Larson denominates the positional risk doctrine. In *Corken*, a traveling employee returning from a restaurant to his automobile was killed without provocation by an apparently deranged stranger. The Workmen's Compensation Board denied recovery in a 3-2 decision which was affirmed by the Circuit Court. The Court of Appeals reversed, overruling *Lexington Railway System v. True*.\(^5\) The test which Judge Palmore erected in writing for the Court was that "the causal connection is sufficient if the exposure [to the risk] results from the employment."\(^6\) The Court thus adopted Larson's classical reasoning that the salesman's employment was the cause of the injury since it was the cause of his presence at what turned out to be a place of danger.

The *Corken* opinion and the rationale of the positional risk doctrine refer to the factor of causal connection between the injury and the employment, a factor customarily construed as being required by the "arising out of" rather than the "in the

\(^{13}\) 301 Ky. 100, 190 S.W.2d 1009 (1945).
\(^{14}\) 385 S.W.2d 949 (Ky. 1964).
\(^{15}\) 276 Ky. 446, 124 S.W.2d 467 (1939).
\(^{16}\) 385 S.W.2d at 950.
course of” facet of the compensation law. The positional risk doctrine assumes that the worker was “in the course of his employment,” for the theory of the doctrine is that if the employee is required by his employment to be in the place which turns out to have been dangerous, i.e., if he is there while engaged in a work-connected activity, the injury sustained is compensable. Interestingly, this closely approximates the approach and language which the Court of Appeals used while trying to forge a workable premises exception to the going and coming rule, a concept based upon the “in the course of” requirement. And, it is the view the Court ultimately adopted as a premises exception, the so-called “operating premises” exception to the going and coming rule, by saying “if we interpret work-connected activity as including work-connected place, we really reach a concept of operating premises.”

Thus by adopting a singular approach to both facets, the Court in effect merged that “arising out of” facet with the very important going and coming portion of the “in the course of” requirement. But, to say that such a merger distorts the going and coming rule would be to forget the rationale of that rule.

The theory for excluding employees from the benefits of workmen’s compensation while going to or coming from work is that they are not performing any service for their employer and are exposed to risk, not as employees, but rather as members of the general public.

Obviously, if the employees are engaged in a work-connected activity, they are “performing [a] service for their employer and are exposed to the risk . . . as employees,” not “as members of the general public.” It should be noted that this negative statement of the going and coming rule is also a statement of the positional risk doctrine.

17 Corken v. Corken Steel Products, Inc., 385 S.W.2d 949 (Ky. 1964).
18 See text accompanying notes 14 and 15 supra.
19 See text accompanying notes 9-14 supra.
20 See text accompanying notes 3-5 supra.
21 Smith v. Klarer Co., 405 S.W.2d 738 (Ky. 1966). This rationale, language, and the label ‘operating premises’ were suggested by this author in Note, supra note 4, at 423-24.
22 Note, supra note 4, at 420.
The new formulation of an operating premises doctrine as a merger of doctrines based upon the supposedly separate requirements of compensability is only a part of the emasculating effect which Corken’s adoption of the positional risk doctrine has had on these requirements. Indeed, the application of the positional risk concept leads to the conclusion that the Court is permitting a presumption to be raised in favor of the employee that his accident arose out of his employment and that the employer must rebut this presumption. Except in a case of private malice as the exciting cause of the injury, the Court’s application of the positional risk doctrine effectively does away with the requirement that the injury must be one both “arising out of and in the course of employment . . . .” Its occurrence “in the course of employment,” i.e. while engaged in a work-connected activity, is, in effect, deemed sufficient. The clearest example of this logic of the Court is Coomes v. Robertson Lumber Company. In that case a workman unloading a truck was seen falling with what was later determined to be a head injury, but no one saw the cause of the injury. The Court held that “arising out of and in the course of employment” are tandem requirements of work-connection with the strength of one able to suffice for the weakness of the other. This view, coupled with the statutorily mandated liberal construction of the Act, thus require that “a rebuttable presumption . . . arises when an employee is found unexplainably injured on his employer’s premises in the course of employment.”

Conversely, the “tandem requirements of work connection” approach mentioned in Coomes is evidenced where the statutory facet slightly satisfied is that the employee be “in the course of employment.” In Blue Diamond Coal Company v. Greech an employee was killed on a public highway an hour and a half after quitting time. He had stopped at the company commissary before

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23 E.g., January-Wood Co. v. Schumacher, 231 Ky. 705, 22 S.W.2d 117 (Ky. 1929) (a nightwatchman killed while making his rounds, but by the watchman’s wife’s lover). See also City of Prestonsburg v. Gray, 341 S.W.2d 257 (Ky. 1960) (city fire chief on 24 hr. call killed in his apartment provided above the fire station, shot by a former fire chief whose resentment of the decendent was clearly shown).
24 427 S.W.2d 809 (Ky. 1968).
25 KRS § 342.004 (1962).
26 427 S.W.2d at 811.
27 411 S.W.2d 331 (Ky. 1967).
departing, but was killed while passing through a picket line at the highway. The Court of Appeals affirmed the Circuit Court, which had reversed a denial of workmen's compensation by the Workmen's Compensation Board. The Court applied the positional risk rule of *Corken* and reasoned that the exposure of being killed by pickets was a result of employment. Obviously, the Court stretched the premises beyond the property line of the employer and extended the "operating premises" concept to make the employee's death compensable because of the strong "arising out of" element, i.e. the strong causal connection between the employee's death and his employment. The employee was not engaged in the activity for which he was employed. Indeed, he had delayed his departure for purely personal reasons. But his activity was nevertheless work-connected because his exposure to the risk of the pickets at his point of departure was caused by (arose out of) his employment. So, the *Coomes* approach operates inversely here, again illustrating that the decisional thrust in these cases is a properly liberal construction of the Act.

Thus, this singular view of compensability effectively reads the statutory clause as "arising [occurring]—out of and in the course of [during]—employment [a work-connected activity]." And considering that the purpose of the statute is to have industry compensate for its human as well as material costs, to have the Act be a promoter of, rather than barrier to, recovery, this is not an inappropriate construction.

**The Operating Premises Doctrine**

Another important consequence of the transformation wrought by *Corken* in creating a singular approach to the question of compensability is to make of paramount importance the question of whether a person was engaged in a work-connected activity when injured. The answer to this question is most obscure when the employee is going to or coming from work. Thus, the doctrine

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29 See e.g., KRS § 342.004 (1962) which requires that the Act be "liberally construed on questions of law..."
the Court has denominated the "operating premises" exception to the going and coming rule is of considerable importance. But, a review of several cases decided with reference to the label "operating premises" will show that the point of decision is the aforementioned liberal construction of the Act reflected in the opinions in Corken, Coomes and Creech. In reviewing these cases, two things should be particularly noted: first, the point of decision in these cases is really not the premises occupied but the activity involved; and secondly, the term "operating premises" consequently represents a conclusion, rather than a method of determining, that an injury is compensable. The Court first referred to the "operating premises" exception in Ratliff v. Eppling.\(^{30}\) In that case an employee of an auger and strip mine company was injured approximately 170 feet from the drift mouth where he actually performed his work. The accident occurred sometime after he had finished his day's work. The Court applied an "operating premises" concept and said that 173 feet from the drift mouth should properly have been considered within the operating premises of the employer. However, the Court denied recovery because the employee had deviated from his employment since the accident happened 30 minutes after quitting time while he was gathering loose coal for his personal use and this deviation contributed to his injury. The Court adopted the operating premises concept in Smith v. Klarer Company.\(^{31}\) In that case an employee fell on a sidewalk in front of his employer's meat packing plant on his way to work. The Court reversed the Circuit Court's judgment which had set aside an award of compensation by the Workmen's Compensation Board. The Court defined "operating premises" by stating "if we interpret work-connected activity as including work-connected place, we really reach a concept of operating premises."\(^{32}\) This, of course, was a marked improvement in approach to Ratliff's concern with the definite ideas of distance from the actual work site.

Other examples of the doctrine's application occur on adjacent premises similar to the sidewalk in Klarer. Foremost among them are the parking lots owned by the employer which employees

\(^{30}\) 401 S.W.2d 43 (Ky. 1966).
\(^{31}\) 405 S.W.2d 736 (Ky. 1966).
\(^{32}\) Id. at 737.
traverse daily in the act of arriving and departing which is incidental to their employment. An injury sustained in a fall on such a parking lot was held with application of the label "operating premises" to be compensable in *Harlan Appalachian Regional Hospitals v. Taylor.*

Another type case under the umbrella of the "operating premises" concept is travel necessitated by the employment, which by definition places the employee more within the course of his employment than in cases such as *Creech, Taylor,* and *Klarer.* Even thirty years ago, recovery would be granted for the death of a traveling salesman in a hotel fire because of the obvious connection with his work. Similarly, if an employee usually employed in one city is required to work the following day in another city and is injured in a traffic accident while traveling to that city, the injury is compensable though it occurs in his off-duty hours while traveling in a vehicle of his own choice.

The cases become a little less clear when the travel is not necessitated by, but is nevertheless related to, the employment. For example, in the most recent case applying the operating premises concept, *Kaycee Coal Company v. Short,* a vice-president was killed in an automobile accident on his way in the company truck from home to work. The truck had certain tools of the company in it at the time of the accident. Moreover, the company furnished him with a telephone and office equipment which he maintained at his home. The Court referred to the positional risk doctrine and said that his home was a part of the operating premises since it was one of the places where he discharged his employment. Thus, he was merely traveling from one area of the operating premises to another when he met his death.

The difficulty associated with the auto accident cases is well illustrated in *Kentucky State Racing Commission v. Short.* In that case a veterinarian left a trace track with certain information

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33 424 S.W.2d 580 (Ky. 1968), overruling *Bickel v. Ford Motor Co.,* 370 S.W.2d 193 (Ky. 1963). For the classic, peculiar risk rationale of the earlier cases denying recovery in parking lot cases, see *Maddox v. Heaven Hill Distilleries,* 329 S.W.2d 189 (Ky. 1959).

34 Standard Oil Co. v. Witt, 283 Ky. 327, 141 S.W.2d 271 (1940).


36 490 S.W.2d 262 (Ky. 1970).

37 433 S.W.2d 873 (Ky. 1968).
to be delivered to his supervisor. However, his itinerary and destination were disputed. The majority denied recovery, saying he was not "in the course of" his employment when the accident occurred. The proper view of the case was taken by the three dissenting judges who would have afforded coverage because the employee was serving his employer by protecting the information. An interesting analogy would be to change the item in the employee's possession from information to money, a day's receipts, for example. A similar, but properly decided, case is Hall v. Spurlock. In that case the employee customarily brought groceries for his fellow workers who lived at the job site when he returned from his weekend trips home. Though this service was voluntary, and though the injury occurred while he was going home for the weekend rather than returning with the groceries, the injury was held compensable on the view that the employer's acquiescence in this procedure made the employee's weekend trips home a "service incidental to the operation of the sawmill."

SOme Concluding Suggestions

In sum, the operating premises doctrine is the label affixed to the judicial approach of determining the compensability of a workmen's injury incurred while going to or coming from work with the single question of whether it occurred from a work-connected activity. This doctrinal statement is so ambiguous as to enlist unanimity of support for a simple statement of it, but dissension as to its application in given cases. And this ambiguity is reflected in the lack of guidelines erected by the Court to aid bench and bar.

Of course, the disposition of any case at law requires flexibility in the principles for use in the decision and the suggestion of guidelines should not be construed as an attempt to straitjacket the Court. Rather, what is needed is a statement of factors which are to be considered in determining whether the employee's injurious activity was work-connected, similar to the factors mentioned in Horne v. Gregg for consideration in determining

38 810 S.W.2d 259 (Ky. 1957).
39 Id. at 261.
40 279 S.W.2d 755 (Ky. 1955).
whether a worker is a servant or an independent contractor. Among factors which could be usefully considered are:

1) Whether the employee was, at the time of the injury, on premises owned by the employer;
2) the size of the premises, if owned by the employer;
3) whether the premises are controlled by the employer, whether owned by the employer or not;
4) the proximity in time and distance from the premises where the employee discharges his work duties;
5) whether the employee was performing some service of benefit to the employer at the time of the injury; and
6) whether the injury is causally related to a work-connected event, irrespective of the place of its occurrence.

The application of such guidelines should be of considerable benefit in determining whether an employee injured while going to or coming from work is entitled to compensation. Certain cases are, of course, clear. The employee at his station doing his assigned task incurs a compensable injury from even so unrelated a cause as a madman. The employee traveling from home to work with no other circumstances of work-connection would not be covered against an assault by the same madman. The guidelines are needed for the gray cases where there is a nebulous or relatively weak circumstance of work-connection.

However, despite the absence of guidelines one thing is clear, the Court of Appeals has been very liberal toward finding injuries to be compensable and should guard against further extension of the exception to the going and coming rule. For while social insurance against the human costs of industrialization may be a construction of the Workmen's Compensation Act consistent with the public sentiment that produced it, it would be improper to construe it as a national accident insurance program against the hazards of traffic and madmen—with the premiums paid by one's employer.