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Notes

WORKMEN'S COMPENSATION – THE "GOING AND COMING" RULE AND ITS EXCEPTIONS IN KENTUCKY

The phrase "arising out of and in the course of employment" in the Workmen's Compensation Act[1] has been the cause of much litigation. In Kentucky it is well established that the phrase has two independent components which must each be satisfied.

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

This note will be directed toward a discussion of only the "in the course of" element of the phrase, and more narrowly to a discussion of the various exceptions to the "going and coming" rule. The general rule is that "in the absence of special circumstances an employee injured in going to or coming from his place of work is excluded from the benefits of workmen's compensation."[3] The theory for excluding employees form 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.[4]

The "Premises" Exception

Since employees generally are not within the protection of workmen's compensation laws while going to or coming from work the question arises, at what point should the employee be considered "in the course of" his employment? As Larson explains, the course of employment is not confined to the actual manipulation of the tools of the work, but neither was the Workmen's Compensation Act intended to protect the worker against all the perils of the journey. Consequently, the first exception to the "going and coming" rule was developed as a compromise between these two extremes.[5] By the

[1] Ky. Rev. Stat. § 342.005 (1959).

[2] Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 280-81, 204 S.W. 152, 159-60 (1918), the first case in Kentucky interpreting the phrase "arising out of and in the course of."

[3] 8 Schneider, Workmen's Compensation § 1710 (3rd or perm. ed. 1951).

[4] Draper v. Railway Accessories Co., 300 Ky. 597, 601, 189 S.W. 2d 934, 937 (1945).

[5] 1 Larson, Workmen's Compensation § 15.11 (1952).

weight of authority 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.[6]

At first blush this exception may appear easy to apply, but this is not the case for its application has proved a troublesome problem in Kentucky. The court in its early decisions applied the exception without modification.[7] For example, in *Barres v. Watterson*[8] a hotel maid was injured on her employer's premises while on her way home from work. In response to a suit based on negligence, the employer contended that the maid was covered by workmen's compensation. In upholding this contention the court said:

> As it was necessary for appellant to enter or leave the premises of the hotel company in the performance of her duties, and her duties did not cease until she was off the premises of her employer, it is clear that she was at the time of her injury in the course of her employment within the meaning of the act.[9]

Again the court applied the basic "premises" exception in *Wilson Berger Coal Co. v. Brown*[10] in which a coal miner was injured on the premises when he stumbled over a rock on the path while on his way from the tipple where he worked to a company-owned house where he lived. In approving an award of compensation the court stated:

> There can be no doubt that an employee, while going to, or returning from, his place of work along a road leading over his employer's premises, and built and intended for his use, is still in the course of his employment, and if he is injured while so traveling, the accident is one arising out of and in the course of his employment.[11]

These two cases illustrate the problem that can arise and which has in fact been the source of conflicting decisions in Kentucky. While it may be reasonable to extend the course of employment to the property line of the employer where the premises consist of a building, the same may not be true where the premises consist of a large

[6] 8 Schneider, Workmen's Compensation § 1712 (3rd perm. ed. 1951); Annot., 82 A.L.R. 1043, 1044 (1933).

[7] Black Mountain Corporation v. Vaughn, 280 Ky. 271, 132 S.W. 2d 938 (1939) (compensable where coal miner killed while riding on train of loaded cars from barn to head house); A. C. Lawrence Leather Co. v. Barnhill, 249 Ky. 437, 61 S.W. 2d 1 (1933) (compensable where employee injured while at or near parking lot on premises); Harlan Gas Coal Co. v. Trial, 213 Ky. 226, 280 S.W. 954 (1926) (compensable where coal miner killed while walking from bath house to place of work on premises); Big Elkhorn Coal Co. v. Burke, 206 Ky. 489, 267 S.W. 142 (1924) (compensable where coal miner killed while on way from room in mine to outside).

[8] 196 Ky. 100, 244 S.W. 308 (1922).

[9] Id. at 103, 244 S.W. at 310.

[10] 223 Ky. 183, 3 S.W. 2d 199 (1928).

[11] Id. at 184, 3 S.W. 2d. at 200.

area of land.[12] If the premises consist of a large area of land such as is generally true with respect to coal mines, should the employee be deemed to be "in the course of" his employment when he is within the property line of his employer? Larson states that "some jurisdictions have followed out the 'premises' rule [exception] literally even if it meant taking in an entire island."[13]

In order to avoid such a literal application of the "premises" exception, where the premises consisted of a large area of land, the court limited the exception in *Harlan Collieries Co. v. Shell.*[14] This case concerned a coal miner on his way home who was injured in a truck accident while still on the premises of the employer. In reversing an award of compensation the court re-examined the purpose of workmen's compensation laws and concluded that they are basically "designed to indemnify the employee from financial loss resulting from exposure to industrial hazards."[15] This decision tends to indicate that the court, in those cases involving a large area of property, will not apply the basic "premises" exception. Instead, the court insists that the injury must have a relation to an industrial hazard. However, this method of narrowing the premises may not prove effective. One noted writer has said that even though the choice of the employer's property line can be criticized as an arbitrary line, nevertheless it is definite. "But 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 successfully be defined."[16] Since the Kentucky Court has abandoned the property line as the place where the employee will be deemed to begin and end the course of his employment,[17] a new line must be drawn as a substitute. The opportunity to do this presented itself in *Clear Fork Coal*

[12] Draper v. Railway Accessories Co., 300 Ky. 597, 189 S.W. 2d 934 (1945) (dictum to the effect that, even if "premises" exception is applicable, compensation will be defeated where the employee does not use the normal route of ingress and egress); 1 Larson, op. cit. supra note 5, § 15.43.

[13] 1 Larson, op. cit. supra note 5, § 15.43.

[14] 239 S.W. 2d 923 (Ky. 1951). *Accord,* Barker v. Eblen Coal Co., 276 S.W. 2d 248 (Ky. 1955) (not compensable where coal miner injured in automobile accident while driving from company house to the mine); United States Steel Co. v. Isbell, 275 S.W. 2d 917 (Ky. 1955) (injury not compensable where coal miner was injured walking down path from parking lot toward bath house); Harlan-Walling Coal Corp. v. Stewart, 275 S.W. 2d 912 (Ky. 1955) (not compensable where coal miner after completing work left his lamp at lamp house and was thereafter injured while walking toward home along highway on employer's premises).

[15] Harlan Collieries Co. v. Shell, 239 S.W. 2d 923, 926 (Ky. 1951).

[16] 1 Larson, op. cit. supra note 5, at 211.

[17] King v. Lexington Herald, 313 S.W. 2d 423 (Ky. 1958) (where the premises consist of a building, the court still applies the basic "premises" exception); *accord,* Barres v. Watterson, 196 Ky. 100, 244 S.W. 308 (1922) (hotel maid injured while leaving building).

Co. v. Roberts[18] in which the court approved an award of compensation to a coal miner who was injured in a truck wreck which occurred after the employee changed clothes at the bath house and accepted a ride to his work place at the tipple located three-quarters of a mile away. The court reasoned that he was engaged in a work-connected activity when proceeding from the bath house to the tipple. Thus, the court in effect estabilshed that the new line would be one drawn around a work-connected activity as opposed to drawing a geographical line.

In groping for a formula as a substitute for the "premises" exception the court had decided earlier in the same year, *Barker v. Eblen Coal Co.*,[19] which is difficult to reconcile with the *Roberts* case. In the *Barker* case the court upheld denial of an award of compensation to a coal miner who was injured while on his way to work from a company house located on the premises to the mine operation. He had accepted a ride in a fellow employee's automobile to the top of a hill where the mine operation was located and after reaching the top, the car backed over the hill due to defective brakes. By comparison, the facts of the two cases are identical except that in the *Roberts* case the employee stopped at the bath house to change clothes before proceeding to his work place, while in the *Barker* case the employee rode straight from his home to the actual place of work. Assuming that each accident occurred at the same place, should the mere fact that one employee chose to change into work clothes at home before proceeding to the mine deprive him of the benefits of workmen's compensation. One possible explaination of these cases is that the *Barker* case was following the test laid down in the *Shell* case,[20] that the injury must have resulted from exposure to an industrial hazard, while the test applied in the *Roberts* case was that the injury must occur after the commencement of a work-connected activity. If the phrase "work-connected activity" is synonymous with "work-connected place" it seems that the employee in the *Barker* case was in the course of employment, since his accident occurred at the place of the mine operation.

Kentucky has not been alone in groping for a solution to the problem as to when an employee should be considered in the course of his employment. Because of the extensive coal mining in Pennsylvania, the courts there have been faced with the identical problem.

[18] 279 S.W. 2d 797 (Ky. 1955). *Accord*, Harlan-Wallins Coal Corp. v. Foster, 277 S.W. 2d 14 (Ky. 1955) (compensable where coal miner suffered an injury when he fell on icy road while en route from his work place to the mine office to return a lamp he had used on his shift).

[19] 276 S.W. 2d 448 (Ky. 1955).

[20] Supra note 14.

They have attempted a solution to the problem by giving the word "premises" a different meaning. For example, they have said according to Schneider, "There is a distinction between 'premises' of the employer and 'property' of the employer, and they are not always synonymous. The term 'premises' has a narrower meaning than the term 'property' when used in compensation cases."[21] Thus, where an employee was injured on a parking lot located upon the property of the employer a denial of compensation was approved since the parking lot was not a part of the operating premises so as to form an integral part thereof.[22]

Also, West Virginia, where coal mining is also a major industry, has been confronted with the problem. Her courts have defined the zone of employment not on the basis of the premises but rather as a point reasonably proximate to the place of work. Or in other words, the zone of employment must have some proximate relation to the plant equipment of the employer, as distinguished from premises of the employer.[23]

Admitting that these tests are vague when compared with the definitness of the property line test under the "premises" exception, they seem to provide a reasonable solution to the problem. Possibly the last test laid down in Kentucky in the *Roberts* case, "work-connected activity" is the same test stated in different language. Furthermore, it is believed that "work-connected activity" here means the same thing as "work-connected place."[24] If so, by drawing the new line around a "work-connected place," consistent results should be able to be reached which will prove fair to both the employer and the employee within the spirit of the Workmen's Compensation Statute.

Extension of the Premises

The courts hold with practical unanimity that, if the injury occurs after the employee has left the premises of his employer and gotten upon a public highway, any injury which he might receive as a result of accidents that are common to the general traveling public is not

[21] 8 Schneider, op. cit. supra note 3, at 50.

[22] Young v. Hamilton Watch Co., 158 Pa. Super 448, 45 A. 2d 261 (1946).

[23] Carper v. Workmen's Compensation Commissioner, 121 W. Va. 1, 1 S.E. 2d 165 (1939).

[24] This seems especially true when the phrase "work-connected activity" is used to determine whether the injury arose "in the course of" the employment. In contrast, "work-connected activity" when used to determine whether the injury "arose out of" the employment might well be expressive of the same idea as that expressed by the phrase "exposure to industrial hazard" used in the Shell case, supra note 14, where the court seems to be talking about causation, that is, about the question whether the injury "arose out of" the employment. In the Roberts case, supra note 17, the court uses the phrase "work-connected activity" where it is discussing the question whether the injury arose "in the course of" the employment.

received in the course of employment.[25] However, various attempts have been made to broaden the premises, especially where the injury occurs just outside the boundary.[26] Larson suggests that the test should be to extend the premises to include areas where there are special hazards on the normal route which the employee must travel in going to and coming from work.[27]

A good illustration of extending the premises to encompass a highway in front of the premises is *Louisville and Jefferson County Air Board v. Riddle*[28] in which the night custodian at an airfield alighted from a bus on the south side of the highway in front of the airfield on his way to work. He checked the obstacle lights located just outside the premises and then as he crossed the highway going toward the airfield gate, he was hit by a car. His injuries were held compensable on the ground that as a practical matter the employer's premises extended to include the obstacle lights maintained across the highway. Even though the court gave as the reason for its decision the fact that the employee was engaged in his work when checking the obstacle lights, the case could have been decided under Larson's view that:

> [W]hen a court has satisfied itself that there is a distinct "arising out of" or causal connection between the conditions under which claimant must approach and leave the premises and the occurrence of the injury, it may hold that the course of employment extends as far as those conditions extend.[29]

Special Errand

In addition to the "premises" exception to the "going and coming" rule, another exception is made when the employee is sent on a "special errand" outside the premises.[30] The explanation for this exception is that the journey itself is part of the service.[31] Applications of the "special errand" exception have been made where an employee is injured while returning to the store at night to admit an electrician or a janitor is injured while returning to the school at night to turn on the lights for a basketball game.[32] The Court of Appeals of Kentucky has recognized and applied this exception where

[25] Miracle v. Harlan-Wallins Coal Corp., 311 Ky. 169, 223 S.W. 2d 738 (1949); Porter v. Stoll Oil Refining Co., 242 Ky. 392, 46 S.W. 2d 510 (1932); 8 Schneider, Workmen's Compensation § 1711(a) (1951).

[26] 1 Larson, Workmen's Compensation § 15.12 (1952). See Draper v. Railway Accessories Co., 300 Ky. 597, 189 S.W. 2d 934 (1945), where it seems a good argument could have been made on the theory that there were special hazards along the only route which the employee knew about.

[27] 1 Larson, op. cit. supra note 5, § 15.13.

[28] 301 Ky. 100, 190 S.W. 2d 1009 (1945).

[29] 1 Larson, op. cit. supra note 5, at 201.

[30] 8 Schneider, op. cit. supra note 3, § 1732.

[31] 1 Larson, op. cit. supra note 5, at 223.

[32] 1 Larson, op. cit. supra note 5, at 224.

a janitor was injured while on an errand into the city to ascertain why a certain employee had not reported for duty;[33] where a mechanic was injured when sent to the home of the president of the corporation for which he worked to make minor repairs;[34] and where an employee was injured enroute home after purchasing supplies for the ensuing week to take to the saw mill on Monday morning.[35]

Transportation Furnished by Employer

Another exception engrafted on the rule that injuries suffered off the premises in going to and from work are not in the course of employment is where the injury is sustained while the employee is being transported by his employer to and from the place of employment pursuant to a contractual obligation.[36] "The provision of transportation by the employer may come about as a result of custom and usage as well as by express contract, as in the cases where employees, working at some distance from their homes, engage in the known and habitual practice of riding on the employer's trucks."[37] However, one noted authority disagrees with the "contract" test on the theory that the true reason for the exception is that the employer has control of the risks while transporting the employee. Thus, he says:

> [T]he distinction between transportation provided by contract and transportation provided without agreement or as a courtesy is being increasingly questioned, since the fundamental reason for extension of liability—the extension of the actual employer-controlled risks of employment—is not affected by the question whether the transportation was furnished because of obligation or out of courtesy.[38]

So under this view, if a trip to or from work is made in a vehicle under the control of the employer, an injury during that trip is incurred in the course of employment.[39]

The Court of Appeals of Kentucky seems to approve the "contract" test as indicated in *State Highway Commission v. Saylor*[40] which involved an employer who transported his employees to and from their work of mowing briers along the highway. From the practice and custom of transporting the workers, the court implied a contract to transport them. The employee was struck by a car after he had been deposited on the highway in front of his residence. Even though the court implied a contract, thus extending the course of employ-

[33] Palmer v. Main, 209 Ky. 226, 272 S.W. 736 (1925).
[34] Nugent Sand Co. v. Hargesheimer, 254 Ky. 358, 71 S.W. 2d 647 (1934).
[35] Hall v. Spurlock, 310 S.W. 2d 259 (Ky. 1957).
[36] 8 Schneider, op. cit. supra note 3, § 1741.
[37] 1 Larson, op. cit. supra note 5, at 236.
[38] 1 Larson, op. cit. supra note 5, at 236-37.
[39] 1 Larson, op. cit. supra note 5, § 17.10.
[40] 252 Ky. 743, 68 S.W. 2d 26 (1933).

ment to the time while he was being transported, it reversed an award of compensation holding that the contractual relation had ended when the employee was deposited safely on the highway. Larson says that even though the general rule is well recognized there is a sharp division of authority whether the protection of the employer's conveyance extends after the employee has been deposited.[41] While the court does recognize the exception, it has disapproved awards of compensation where a laborer was injured while riding to work with an employee who had been engaged with his truck for work on a road construction job;[42] where an employee of a road building contractor was injured by falling off a truck which he contended the employer directed him to ride;[43] and where a laborer was injured while on his way to work while riding on the running board of his foreman's car.[44]

Cost of Transportation Paid by Employer

Another exception to the "going and coming" rule is made when the cost of transportation is paid by the employer.[45] Larson disagrees with the statement of the exception, because it can produce different results depending on the labeling of the payment. However, he agrees with the result, reasoning that employment should be deemed to include travel when the travel itself is a substantial part of the service performed.[46] The Kentucky Court recognized this exception in *Turner Day and Woolworth Handle Co. v. Pennington*[47] in which, as inducement to the employee to go to distant locations to work, the employer agreed to allow him to return home on week-ends at the expense of the employer. While returning home on Saturday night the employee sustained injuries in an automobile accident for which he was awarded compensation. However, a more recent case indicates that payment of travel expenses by the employer may not be sufficient in itself. An award of compensation was disapproved where the employee who was the son of the president of the corporation was permitted to use a company car with oil and gas paid for by the corporation in order to make a trip in an effort to secure a different job. The court felt that the trip bore no relationship to any service he was at the time undertaking in behalf of his employer.[48] This latter case seems to support Larson's view that the travel itself

[41] 1 Larson, op. cit. supra note 5, § 17.40.
[42] W. T. Congleton Co. v. Bradley, 259 Ky. 127, 81 S.W. 2d 912 (1935).
[43] Gray v. W. T. Congleton Co., 263 Ky. 716, 93 S.W. 2d 829 (1936).
[44] Billiter, Miller and McClure v. Hickman, 247 Ky. 211, 56 S.W. 2d 1003 (1933).
[45] 8 Schneider, op. cit. supra note 3, § 1744.
[46] 1 Larson, op cit. supra note 5, § 16.30.
[47] 250 Ky. 433, 63 S.W. 2d 490 (1933).
[48] Taylor v. Taylor Tire Co., 285 S.W. 2d 173 (Ky. 1955).

must be a substantial part of the service performed to be considered in course of the employment.[49]

Where Traveling Itself is Part of the Job

Still another exception to the "going and coming" rule is where traveling itself is part of the job, in which case the employee will be considered in the course of employment from the time he leaves home, until his return home.[50] The underlying theory for the exception is that the journey itself is part of the service for the employer.[51] Among the cases decided by the Kentucky Court, *Standard Oil Company v. Witt*[52] best illustrates the application of this exception. In that case the employee was a construction foreman who was required to travel from his home to work on construction projects. Whenever he did not return home on week-ends, his board and lodging were paid for by his employer. While a guest in a hotel on such a weekend the employee was killed in a fire about 4:30 on a Monday morning. The court approved an award of compensation on the basis that when he met his death he was at a place where he was expected and required to be by the nature of his employment.

Where an employee is required to travel as part of his job a problem often arises when the employee deviates from his regular route. Among the various situations in which the problem may arise is where an employee takes a personal side-trip while en route, which side-trip will take him out of the course of employment.[53] However, where the side-trip has been completed and the direct route has been resumed the employee is again in the course of employment.[54] Between these two situations the question arises whether the employee is in the course of employment when he resumes his journey but has not yet reached his regular route? The Kentucky Court was confronted with this problem in *Inland Gas Corporation v. Frazier*[55] which in-

[49] 1 Larson, op. cit. supra note 5, § 16.30.
[50] 8 Schneider, op. cit. supra note 3, § 1737.
[51] 1 Larson, op. cit. supra note 5, § 16.00.
[52] 283 Ky. 327, 141 S.W. 2d 271 (1940). *Compare* Hinkle v. Allen-Codell Co., 298 Ky. 102, 182 S.W. 2d 20 (1944) (compensable where employee was injured while traveling to his place of work on Sunday in order to be ready to begin working on Monday morning), *with* Scott Tobacco Co. v. Cooper, 258 Ky. 795, 81 S.W. 2d 588 (1934) (not compensable where traveling salesman injured on Sunday at the place he went to be ready to work the ensuing week).
[53] 1 Larson, op. cit. supra note 5, § 19.31.
[54] 1 Larson, op. cit. supra note 5, § 19.32.
[55] 246 Ky. 432, 55 S.W. 2d 26 (1932). See also Colwell v. Mosley, 309 S.W. 350 (Ky. 1958) (not compensable where truck driver was injured when he stopped on his route in order to pull his brother-in-law's car); Mason-Waller Motor Co. v. Holeman, 284 Ky. 374, 144 S.W. 2d 796 (1940) (compensable where automobile salesman visited prospects in several towns and, while doing so, picked up friends with whom he visited various dancehalls; the court concluding that he had resumed his employment).

volved an employee who was required to report from his job at one location to another place. In making the trip the employee deviated from his regular route by taking a side-trip to spend the night with his family. Early the next morning he resumed his trip toward the new location and when at a point only three miles from his regular route, he was killed in an automobile collision. In denying an award of compensation the court conceded that the nature of his work and terms of his contract required him to travel, but found that at the time and place of his death he was engaged in his own pleasure while returning to the usual route of travel. Thus, the court followed the majority view. However, a minority take the view that an injury occurring during the journey toward the normal route should be compensable because the employee's only purpose is getting to his employment destination.[56]

RICHARD D. COOPER

WORKMEN'S COMPENSATION — ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

In order for an injury to an employee to be compensable under the Workmen's Compensation Statute, the employee must prove among other things that the injury "arose out of and in the course of employment." As was pointed out in a previous note,[1] this latter phrase was defined by the Court of Appeals of Kentucky in the first workmen's compensation case to come before the court when it 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 term 'out of' and 'in the course of' are not synonymous, and if either of these elements is missing, there can be no recovery. The two questions are to be determined by different tests. The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place and circumstances [activity] under which it occurred."[2]

In other words, "whenever your controversy stems from the nature of a source of injury to the claimant, you have primarily a question of 'arising out of the employment'."[3] Thus, it becomes important to know whether the injury was the result of the manipulation of the tools of his work, or from the personal animosity of a fellow employee, or from something else such as a stray bullet or bolt of

[56] 1 Larson, op. cit. supra note 5, § 19.33.

[1] Note, 47 Kentucky Law Journal 420 (1959) supra.
[2] Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 280-81, 204 S.W. 2d 152, 159-60 (1918).
[3] 1 Larson, Workmen's Compensation § 23.61 (1952).