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# Workmen's Compensation--Going and Coming Rule as Applied to Policemen

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is generally prohibited from representing clients with conflicting interests ..."[7] Moreover, the court considered the matter of advertising. The defendant title companies often advertised, holding out to the public that there were lawyers on their staff, which, as to the lawyer-employee, exceeded the limitation of the Canons.[8] Thus, the employment of lawyers did not afford the title companies a means by which to circumvent the prohibition against the corporate practice of law.

The second argument, though not original,[9] involved the *full disclosure theory* which the court accepted. This theory postulates that when a client deals with one neither a lawyer nor one governed by the code of ethics to which the lawyer is subject, the client is not assured the full disclosure of the effects of legal transactions to which he is a party and to which he is entitled. To the same effect, in dealing with the lawyer-employee a client deals with one whose principal motivation is the interest of his corporate employer. Thus, the art of conveyancing when practiced by the lawyer-employee or by the non-lawyer businessman is deleterious to the public interest and should be proscribed.

Clearly law must not be practiced by those who would profit by its administration. The present decision is motivated by this high ideal. There is, however, a dispute as to whether conveyancing is a matter which ought to be reserved to the legal profession.[10] Nonetheless, the present holding is a step forward in the direction of what Dean Pound refers to as a "resurgence of professionalism."[11] The prospect of more cases reaching the same conclusion as the present case may be limited by the practical considerations of expense and of the availability of attorneys.[12]

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## WORKMEN'S COMPENSATION — GOING AND COMING RULE AS APPLIED TO POLICEMEN

*Simerlink v. Young, 172 Ohio St. 427, 178 N.E.2d 168 (1961)*

Plaintiff, a police officer, while in uniform and carrying his service revolver, billy club, flashlight, keys, whistle, and other incidents of his employment, was injured in an automobile accident while driving to

7. 90 Ariz. 76, 90, 366 P.2d 1, 11 (1961).

8. Canons 27, 35, 47, CANONS OF PROFESSIONAL ETHICS.

9. This argument was advanced in Beach Abstract & Guaranty Company v. Bar Association of Arkansas, 203 Ark. 494, 501, 326 S.W.2d 900, 903 (1959).

10. See Buchignani, *The Practice of Law — Why It Is a Profession,* 41 J. AM. JUD. SOC'Y 179 (1958).

11. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 362 (1953).

12. *Cf.* Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957). The Colorado court in sustaining conveyancing by non-lawyer realtors predicated its holding on the practical considerations of expense and of the lack of attorneys in a number of counties of that state.

work. The Supreme Court of Ohio,[1] disregarding the fact that a police officer is at all times charged with the duty to preserve and maintain law and order, denied compensation on the ground that the injury did not arise out of or in the course of employment.

Ordinarily, injuries sustained while going to or coming from work are not compensable.[2] Workmen's compensation statutes are not intended to protect the worker against all perils of the journey. However, "in course of employment" is not confined to the actual manipulation of the tools of work.[3]

In 1923 the United States Supreme Court in *Cudahy Packing Company v Parramore*[4] announced that an injury arising out of the employment could be shown by proving that there was a "causal connection between the injury and the business a connection substantially contributory though it need not be the sole proximate cause" and that "no exact formula can be laid down which will automatically solve every case."[5] The *Cudahy Packing Company* decision gave rise to many exceptions that have been engrafted onto the "going and coming" rule. Exceptions applicable to the *Simerlink* case which permit recovery for injuries sustained are: (1) when traveling is part of the job,[6] (2) when the employee is subject to call,[7] (3) when the undertaking is consistent with the employer's contract for hire[8] and which in some logical manner per-

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1. Simerlink v. Young, 172 Ohio St. 427, 178 N.E.2d 168 (1961).

2. 42 OHIO JUR. *Workmen's Compensation* § 53 (1936)

3. 1 LARSON, WORKMEN'S COMPENSATION § 15.11 (1952)

4. 263 U.S. 418 (1923)

5. *Id.* at 423-24.

6. When traveling is part of the employment, the employee will be considered in the course of employment from the time he leaves home until he returns. 8 SCHNEIDER, WORKMEN'S COMPENSATION § 1737 (3d ed. 1951). See also Healey v. Hudson Coal Company, 130 Pa. Super. 462, 198 Atl. 684 (1938), where a police lieutenant was injured while returning home; the court held that for purposes of compensation under the Workmen s Compensation Act his duties began when he left home and ended when he returned. Pennsylvania defines "injury" to include all "injuries sustained while the employee is actually engaged in the furtherance of the employer s business " PA. STAT. ANN. tit. 77, § 301(c) (1950).

7 Voehl v. Indemnity Ins. Co., 288 U.S. 162 (1933) However, Ohio follows the rule that "subject to call" is not an exception to the "going and coming rule." Cardwell v. Industrial Comm n, 155 Ohio St. 466, 99 N.E.2d 306 (1951) When an employee has finished his work and is on his way home, on a mission of his own, and is injured at a place where he is not required to be by his employment, it makes no difference whether he works regular hours or is subject to call by the employer. Richtarik v. Bors, 142 Neb. 226, 5 N.W.2d 399 (1942) This view has been criticized on the ground that to make an award only when the employee is working gives him no greater protection than the worker with set hours who has the remainder of the day free from employment. 41 NEB. L. REV. 52 (1961)

8. The Supreme Court of Tennessee held in Town of Tullahoma v. Ward, 173 Tenn. 91, 114 S.W.2d 804 (1938), that a police officer in uniform, while walking home, was charged with the duty to preserve peace and order and, therefore, regardless of his immediate or ultimate destination, was in the scope of his employment. The Workmen's Compensation Act of Tennessee, like that of Ohio, limits "injury" to one resulting from an accident arising out of and in the course of employment. TENN. CODE § 50-902(d) (1956)

tains to or is incidental to his employment,[9] (4) when the employee is furthering the employer's business,[10] or, (5) when the injury results from a hazard of the employee's work.[11]

The causal connection between employment and injury defined by the United States Supreme Court in *Cudahy Packing Company v. Parramore*[12] was found to exist in *Sweat v. Allen*[13] where a police officer was injured while going to work. The court in the *Sweat* case reasoned that even though the injury occurs while the police officer is going to work, the same causal connection exists as when a police officer is injured while attempting to arrest a drunken driver.[14]

Ohio follows the general rule that injuries are not compensable when an employee is injured while going to or from work where such employee has a fixed and limited working place.[15] An exception to this rule is when the employee is still charged, while on his way to or after reaching home, with some duty[16] or task in connection with his employment.[17]

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9. In Kyle v. Green High School, 208 Iowa 1037, 226 N.W. 71 (1929), compensation was granted where an employee, although not at his regular place of employment and before or after customary working hours, was discharging some duty incidental to the nature of his employment in the interest of, or under direction of, his employer. See also Smith v. Industrial Comm'n, 107 N.E.2d 220 (Ohio Ct. App. 1948).

10. "Furthering the employer's business" has been applied in such situations as: where an employee was injured on Sunday while going home after church to get a key to check his employer's furnace, Kromley v. Board of Educ., 13 N.J. Misc. 627, 180 Atl. 546 (Workmen's Compensation Bureau 1935); where an employee was injured going to work after receiving a phone call at home to go to work, Kyle v. Green High School, *supra* note 9; where the employee was returning home to phone in sales order after his day's service was completed, Bachman v. Waterman, 68 Ind. App. 580, 121 N.E. 8 (1918); where an employee was returning home with an empty water can belonging to his employer to fill and take it back in the morning, Ince v. Chester Westfall Drilling Co., 346 P.2d 346 (Okla. 1959); and where an employee was to pick up tools, Muir v. Wilson, 194 Pa. Super. 487, 168 A.2d 588 (1961).

11. Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944). The court held that a traveling repairman's death was compensable when he was burned while sleeping in a public boarding house, for his employment brought him in contact with the risk that caused his death.

12. 263 U.S. 418 (1923).

13. 145 Fla. 733, 200 So. 348 (1942). The Florida statute contains wording similar to that found in section 4123.01(c) of the Ohio Revised Code. Florida Statutes Annotated section 440.02(6) (1952) provides: "The term 'injury' means personal injury or death by accident arising out of and in the course of employment . . . ."

14. *Id.* at 735, 200 So. at 351. The mere fact that a policeman is required to hold himself ready to perform certain duties at any hour of the day and night is insufficient to place him in the performance of his duties. To hold otherwise, would be to allow compensation, even if the injury is received while he is at home or at a party or on a personal mission.

15. 42 OHIO JUR. *Workman's Compensation* § 53 (1936). 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 as members of the general public. To award compensation for injuries received while going to or from work without any evidence that the cause of the injury arose out of the work, would convert the compensation plan into an insurance against injuries wherever and however received. Baumbach v. Industrial Comm'n, 59 Ohio App. 101, 17 N.E.2d 389 (1938).

16. The Supreme Court of Ohio held in State *ex rel.* Schoedinger v. Lentz, 132 Ohio St. 50, 5 N.E.2d 167 (1936), that "duty" embraces all manner of duty imposed upon a police officer,

In other words, if the employee is furthering the employer's business at the time of the injury,[18] that injury arises out of and in the course of his employment.

Thus, a causal connection between the harm received and the employment must exist.[19] The Supreme Court of Ohio has said that a causal connection exists if it is apparent to the rationale mind, upon consideration of all circumstances, that there is a proximate causal connection between the conditions under which the work is required to be performed and the resulting injury.[20] Also the Ohio courts have awarded compensation where the injury follows as a natural incident of the work and as a result of exposure occasioned by the nature, condition, or surrounding of the employment.[21] Such an exposure has been defined as a hazard of the employment[22] peculiar to the work and not common to the general public in the community.[23] The criterion to determine what is peculiar to the work is not whether others are exposed to the same dangers of travel. The test is whether, with reference to the nature of employment, performance of special service within the scope of such employment and in interest of, or by direction of, the employer peculiarly subjects the employee to added dangers out of which the accident occurs.[24] Thus, in the *Simmerlink* case the Ohio Supreme Court drew a rather fine distinction between anticipatory duty and actual performance of duty as to police officers.

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independent of the question of time, place, or manner of person. Lentz, a police officer, was killed while cleaning his service revolver at home. The court reasoned that a police officer who does an act, which by standing department rule or order he is under obligation to do, is engaged in the performance of his duty.

17 Stevens v. Industrial Comm n, 145 Ohio St. 198, 61 N.E.2d 198 (1945)

18. "Furthering the employer s business" has been applied in such cases as: cranking a car at home which has been furnished by the employer, Industrial Comm n v. Wilson, 34 Ohio App. 36, 170 N.E. 37 (1939); sustaining injury while returning home with day s receipts for safekeeping, Standard Oil Co. v. Clark, 44 Ohio App. 211, 184 N.E. 861 (1933)

19. Maynard v. B. F. Goodrich Co., 144 Ohio St. 22, 56 N.E.2d 195 (1944).

20. Highway Oil Co. v. State *ex rel.* Bricker, 130 Ohio St. 175, 198 N.E. 276 (1935). However, an earlier case, Fassig v. State *ex rel.* Turner, 95 Ohio St. 232, 116 N.E. 104 (1917), appears to modify this definition. The rule announced in the *Fassig* case apparently would not cover any case where the cause of injury was outside of and disconnected with the employment, although the employee may at the time have been engaged in doing the work of his employer in the usual way.

21. Sebek v. Cleveland Graphite & Bronze Co., 148 Ohio St. 693, 76 N.E.2d 892 (1948)

22. Tipplie v. High St. Co., 70 Ohio App. 397, 41 N.E.2d 879 (1942).

23. Walborn v. General Fire-Proofing Co., 147 Ohio St. 507, 72 N.E.2d 95 (1947). In the case of workmen whose duties are such that they are obliged to be continuously upon the street in the course of their employment, some courts make a distinction upon the theory that the very nature of the employment subjects them to the street dangers more than persons generally are subjected to and consequently injuries from such dangers must be considered as arising out of and in the course of the employment. See Annot., 1916A L.R.A. 314.

24. Smith v. Industrial Comm'n, *supra* note 9.