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Workmen's Compensation--"Arising Out Of" Requirement--Operating Premises

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if Mr. Franklin had been found contributorily negligent, he would have been barred from recovery just as were the plaintiffs in *Seelbach, Inc. v. Mellman*[39] and *Tate v. Canary Cottage.*[40] Nor is there any reason to believe that *Blue Grass Restaurant* in any way overruled *Brown Hotel* in which the accident causing the injury was held not to have been within the contemplation of the ordinance violated. Rather, it must be said that the Court in *Blue Grass Restaurant* merely followed existing Kentucky law as applied to its facts. Any criticism must be directed at the unfortunate choice of words used in the one-sentence holding, which, if taken out of context from the rest of the opinion, would seem to imply that absolute liability was imposed.

William S. Cooper

WORKMEN'S COMPENSATION—"ARISING OUT OF" REQUIREMENT—OPERATING PREMISES.—Plaintiff was employed in a hospital and covered by the Kentucky Workmen's Compensation Act. She fell and was injured one morning while walking toward the hospital from the hospital parking lot where she had parked her car. The Workmen's Compensation Board denied her claim for compensation and plaintiff appealed to the Harlan County Circuit Court. The decision was reversed by the Circuit Court and the Board appealed to the Kentucky Court of Appeals. *Held*: Affirmed. The parking lot was a part of the employer's operating premises and the injury was therefore compensable. *Harlan Appalachian Regional Hospital v. Taylor,* 424 S.W.2d 580 (Ky. 1968).

Kentucky's Workmen's Compensation Act requires that a compensable injury arise "out of *and* in the course of . . . [the employee's] employment."[1] (Emphasis added) The development of this dual requirement, as interpreted by the Kentucky Court of Appeals, has followed a definite pattern.

The initial arise "out of" requirement has historically been linked with causation and has been the primary test. In fact the second requirement of arising "in the course of his employment" was often dependent upon the first.[2] In parking lot situations similar to that in

[39] 293 Ky. 790, 170 S.W.2d 18 (1943).
[40] 302 Ky. 313, 194 S.W.2d 663 (1946).

[1] KY. REV. STAT. [hereinafter cited as KRS] § 342.005(1) (1962).
[2] In considering the principle behind the exceptions to the premises rule, Larson says "in this instance, as in many others, the concept of 'course of employment' follows that of 'arising out of employment'; that is, the employment-connected risk is first recognized, and then a course-of-employment theory must be devised to permit compensation for that obviously occupational risk." 1 LARSON, WORKMEN'S COMPENSATION LAW [hereinafter cited as LARSON] § 15.15 (1965).

Taylor, the Court has handed down two decisions, both dealing primarily with causation.[3] In *United States Steel v. Isbell*,[4] a miner slipped on ice and snow before he reached the bathhouse on his way to the mine. Following the *Harlan-Wallins Coal Corp.*[5] decision of the same day, the Court denied compensation, ruling that it was not shown that the injuries suffered by the employee had a causative connection with the employment. Compensation was again denied in *Bickell v. Ford Motor Co.*[6] in 1963 where the claimant fell on ice in the parking lot furnished by the employer. The Court found that the injury did not arise out of his employment since "The accident and resulting injury were not incident to the hazards of Bickell's employment."[7] The requirement of a causation linkage between the injury and the hazards of the employment was not to continue to be a bar in parking lot situations.[8]

In 1965 the Kentucky Court of Appeals adopted the positional risk doctrine in *Corken v. Corken Steel Products, Inc.*[9] without stating restrictions on its use. The question was whether the Court would

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[3] There is one other significant parking lot decision in which an employee leaving work fell and broke his leg in his employer's parking lot. But the employee had felt ill during the day, and compensation was allowed since it was "shown with reasonable certainty that his dizziness or blindness resulted from the nature of the work and formed a part of the train of causation of his accidentally falling and breaking his leg. . . ." A.C. Lawrence Leather Co. v. Barnhill, 249 Ky. 437, 61 S.W.2d 1, 4 (1933).

[4] 275 S.W.2d 917 (Ky. 1955).

[5] Harlan-Wallins Coal Corp. v. Stewart, 275 S.W.2d 912 (Ky. 1955).

[6] 370 S.W.2d 193 (Ky. 1963).

[7] *Id.*

[8] This requirement was generally applied in "going and coming" rule cases. The control of the employer over the trip, the surrounding environment, and particularly the damaging instrumentality appears to have uniformly determined the arising "out of" issue and, therefore, compensation. For example, where an employee picked up a live wire on the employer's premises on his way from the bathhouse to the mine and was electrocuted, the Court allowed compensation. Harlan Gas Coal Co. v. Trial, 213 Ky. 226, 280 S.W. 954 (1926). But where the employee was injured on his way home in a non-employee's truck, due to a faulty steering gear, on a road maintained by the employer, compensation was denied by the Court; *See* Harlan Collieries Co. v. Shell, 239 S.W.2d 923 (Ky. 1951).

[9] 385 S.W.2d 949 (Ky. 1964). Larson defines the "positional risk" doctrine as follows:

> An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. . . . This theory supports compensation . . . in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he was injured by some neutral force. . . . 1 LARSON § 10.00.

See Note, *Kentucky Adopts the Positional Risk Doctrine: Chance for a New Approach*, 55 KY L.J. 172 (1966).

expand this decision to include "neutral" risks[10] and even beyond to personal risks, a position not taken by many jurisdictions.[11] The 1965 decision was not clear on the matter. In 1965[12] and 1966[13] the Court further added to the confusion in citing the *Corken* case but not using the positional risk theory.[14] The potentially sweeping doctrine was still unapplied outside the typical positional risk situation.

If the Court has adopted the positional risk doctrine in at least all neutral risk cases, this rather generous determination has reduced the causation connection of the injuries with the industrial risks of the employment to a factor of very little consequence. This would leave the "out of" requirement a low hurdle for claimants which could quickly be passed over to the "course of" requirement.[15]

Traditionally, under the "course of" requirement, an employee was not compensated for injuries suffered while going to or coming from work.[16] Well-recognized was the "premises" exception, allowing compensation while the employee was on the premises of the employer, within reasonable and subjective limits of time.[17] The Kentucky Court of Appeals refused to allow compensation to be governed by the boundary line of the employer, and the employer's premises were carefully distinguished from his property.[18] But the premises exception was not an absolute rule. Occasionally the Court established an "exception to the premises exception" where a reason was found to extend the premises line of the employer to include something not legally a part of the premises.[19] Conversely, the Court sometimes failed to apply the premises exception, as in *Draper v. Railway Accessories Co.*[20] wherein the Court denied compensation to a railroad employee

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[10] Neutral risks are defined by Larson as those risks neither clearly personal to the employee nor peculiar to the employment. 1 LARSON § 7.30.

[11] *See* 1 LARSON § 6.40.

[12] Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965).

[13] Gordon v. Jefferson County Fiscal Ct., 403 S.W.2d 278 (Ky. 1966).

[14] For a discussion of the position of the law after *Black* and *Gordon*, see *Workmen's Compensation*, 1967 *Court of Appeals Review*, 55 KY. L.J. 492 (1967).

[15] In *Barker v. Eblen Coal Co.*, 276 S.W.2d 448 (Ky. 1955), the Kentucky Court stated the rule for premises cases: "in order to be compensable the accident must have some relation to an industrial hazard." 276 S.W.2d 448, 449 (Ky. 1955). See 8 SCHNEIDER, WORKMEN'S COMPENSATION TEXT [hereinafter cited as SCHNEIDER] § 1719 (1951).

[16] See 8 SCHNEIDER § 1710; Draper v. Railway Assessories Co., 300 Ky. 597, 189 S.W.2d 934 (1945).

[17] 1 LARSON § 15.11. Kentucky has not accepted the premises exception as a positive rule, but rather has narrowed it. *See* 1 LARSON § 15.42.

[18] Ratliff v. Epling, 401 S.W.2d 43, 44 (Ky. 1966).

[19] Louisville & Jefferson County Air Bd. v. Riddle, 301 Ky. 100, 190 S.W.2d 1009 (1945). (allowing compensation to night custodian of airport, struck by car while crossing public highway adjacent to airport before work, since he inspected the warning lights on poles before the accident.)

[20] 300 Ky. 597, 189 S.W.2d 934 (1945).

although he was injured on the premises on his way home.

The Court reactivated the premises extender in *Ratliff v. Epling*.[21] In this case, a miner, while waiting for his ride after work, decided to pick up some wood for his personal use. An embankment on the employer's premises caved in and he was killed. The Board denied compensation and the Court of Appeals affirmed. Here was an employee who had left the actual working premises of his employer, had lingered on the general property of the employer after hours for personal reasons, and was injured in a manner foreign to the tasks at work and the risks they involved. The problem was that he still was on the employer's premises. The Court took a new view of the term "premises" to allow an escape from the liability limitation of the going and coming rule. Where the injury did not occur on the "operating premises" of the employer, compensation would be denied.[22] "In our opinion the 'operating premises' test is a fair one and most consistent with the trend of our decisions, and we hereby adopt it."[23] Operating premises became the new exception to the going and coming rule—a decision in keeping with previous holdings refusing to make compensability guidelines congruent with boundary lines.

The effect of the *Taylor* decision was to elaborate on the extent of the operating premises line. The Court dealt exclusively with the question of whether the employee was in the course of her employment at the time of the injury. Emphasis was placed on the necessity of hospitals having parking lots for personnel. The holding was modeled after a decision of the Pennsylvania Supreme Court,[24] the originator of the "operating premises" test. The Pennsylvania Court had held that "the parking lot was clearly an integral part of the hospital premises."[25] Under this theory, the Kentucky Court held that the parking lot qualified as part of the operating premises of the hospital within the rule. Its extension to the hospital parking lot was a carefully narrow holding, not generally applicable to parking lots furnished by employers.[26] Note the wording by the Pennsylvania Court, as quoted by

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[21] 401 S.W.2d 43 (Ky. 1966).

[22] *Id.* at 43, 44. The Kentucky Court took the concept from decisions by the Pennsylvania Supreme Court. A short survey of the operating premises rule as maintained in Pennsylvania is found in 1 LARSON § 15.42.

[23] 401 S.W.2d 43, 45 (Ky. 1966). In that decision, an additional issue of deviation from the course of the employment denied compensation to the claimant although he was said to have been on the operating premises of the employer.

[24] Shaffer v. Somerset Community Hosp., 205 Pa. Super. 419, 211 A.2d 49 (1965).

[25] *Id.* at —, 211 A.2d at 49, 50.

[26] Although the language in *Taylor* leads us to narrowly construe the holding, it should be noted that the Court overruled four cases including the two aforementioned parking lot cases rather than distinguishing them, leaving the way

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the Kentucky Court of Appeals, in a case where compensation was denied:

> In the present case it is obvious that the parking lot was not a part of the operating business; it was distinct therefrom and separated from defendant's plant by a public throughfare . . . . Neither physically nor constructively was the parking lot part of the premises upon which the employer's business was conducted, and in which the claimant was engaged. If claimant's theory is sound, any such parking lot, regardless of its remoteness to an employer's plant, would have to be considered as part of the premises upon which the employer's business was carried on. The word "premises" cannot be enlarged in its meaning and application so as to include land or property outside of that used in connection with the actual premises where the employer carries on the business in which the employee is engaged.[27]

The operating premises theory is best applied to field enterprises where the employment is not confined to a building or structure.[28] In the plant or factory, the operating premises are within the plant, possibly extending outside of the loading dock or delivery entrance a matter of feet. This holding does not seem to affect the non-inclusion of parking lots as operating premises in those situations.[29] However, as the premises exception to the exclusionary going and coming rule expands, this holding may be more widely construed.

Equally important is what the decision did not consider. The decisive issue in the two similar situations earlier before the Court[30] was the lack of a causative link between the injury and an industrial risk of the employment. In the *Taylor* decision, the arising "out of" issue was never discussed.[31] The issue should not have been overlooked. If the employee is being employed to walk from his bench

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open for further extension of the rationale to include other parking lots. Indeed, if the key of the decision was the necessity of a hospital having a parking lot, is it any less necessary for any other business to have one, where its employees must drive to work?

[27] Young v. Hamilton Watch Co., 158 Pa.Super. 448, 45 A.2d 261, 263 (1946).

[28] This is the type of situation in which the operating premisses theory was adopted. The problems of "premises" in coal mining situations have troubled the Kentucky Court for many years. *See* Note, *Workmen's Compensation—The "Going and Coming" Rule and its Exceptions in Kentucky*, 47 KY. L.J. 420 (1959).

[29] It is difficult to believe that, if this holding is enlarged to include other "necessary" parking lots, the distinction between adjacent and non-adjacent parking lots across a street, as recognized by the Pennsylvania decisions and quoted by the Kentucky Court, will continue to stand as the dividing line for operating premises.

[30] United States Steel v. Isbell, 275 S.W.2d 917 (Ky. 1955); Bickell v. Ford Motor Co., 370 S.W.2d 193 (Ky. 1963).

[31] Was this an application of the positional risk doctrine as adopted in *Corken v. Corken Steel Prods., Inc.*, 385 S.W.2d 949 (Ky. 1964)? Or did *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966), obviate the consideration? It should not be overlooked that in basic workmen's compensation theory such a parking lot situation often raised only the determinative "course of" issue. 8 SCHNEIDER, § 1719. Note the following discussion in Ratliff:

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to the loading dock and falls on ice at the dock, then he will be compensated. But in *Taylor* the Court extends compensation to a new area for Kentucky; the former bar to compensation in these cases should not be quickly passed over. Falling on ice is the kind of mishap that would be expected to occur when workers are engaged in unloading trucks on icy docks. But a hospital laboratory technician is hardly expected to encounter this difficulty in the performance of her duties. Viewed independently through common meaning, the risk of falling on ice in the parking lot is clearly a personal one and not one to be placed on the product or service.[32]

However, an injury on the operating premises from a hole in the pavement, from an accident with an ambulance, or from an accident in delivery of goods to the hospital is incident to the normal hospital routine and might properly be compensated. It is asserted that the causation linkage requirement found in the two earlier cases expressed a needed consideration beyond the "course of" issue. Note Larson's workable explanation of the exception to the premises exception:

> [W]hen a court has satisfied itself that there is a distinct "arising out of" or causal connection between the conditions under which the claimant must approach and leave the premises and the occurance of the injury, it may hold that the course of employment extends as far as those conditions extend.[33]

It is evident that much of this rationale as expressed in earlier Kentucky decisions has been overruled by the Court in recent years.[34]

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> The theory of some of those cases was that the accident was not covered, even though occuring on the employer's premises, because the employee was not exposed to an "industrial hazard." Since our cases have not uniformly used this criterion (which is a rather elusive one at best), and since eminent authorities do not consider it relevant, we no longer think it should be controlling. Ratliff v. Epling, 401 S.W.2d 43, 44 (Ky. 1966).

[32] "The ultimate social philosophy behind compensation liability is belief in the wisdom . . . of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product." 1 LARSON § 2.20.

[33] 1 LARSON § 15.15.

[34] *See* Harlan Collieries Co. v. Shell, 239 S.W.2d 923, 927 (Ky. 1953). Further, this former intent was a part of the rationale of another decision overruled in *Taylor*:

> A majority of the members of the Court are still of the opinion that the Shell case presents a sounder approach to the question than would result from its consideration in terms of time, or place, or both. . . . Furthermore, we think it is for the Legislature and not the courts to determine the policy of whether the Compensation Law, KRS § 342.001 *et. seq*, should cover workers when going to and from work on the premises of their employers. Harlan-Wallins Coal Corp. v. Stewart, 275 S.W.2d 912, 913-14 (Ky. 1955).

The full effect of the adoption of the positional risk and operating premises doctrines awaits further illumination by the Court of Appeals. It is clear that the new look which the Court is giving KRS 342.005(1) requirements of arising "out of and in the course of his employment" will result in allowing more comprehensive coverage.

Glen S. Bagby

ARREST PROCEDURE: RIGHT TO USE FORCE TO ARREST DURING A RIOT

> A riot is the earlier sowing of bitterness and confusion by political opportunists and racial hate mongers, goody goody fakes, Negro and white, coupling themselves tragically with the public apathy that marks off this whole generation to anybody's needs.[1]

Kentucky's first racial violence occured in Louisville, beginning on the evening of May 27, 1968.[2] The rioting continued for several days and was accompanied by vandalism, looting and burning. Several of Louisville's ghetto residents were injured, many by policemen's bullets. This tragedy reached its climax when two teenage Negro boys were killed—one by a storeowner and the other by a blast from

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[1] Sermon by the Rev. W. Carter Merbreier, *Shattered Toys in Black and White* on the Philadelphia Riots, Summer, 1964 as cited by Leary, *The Role of the Police in Riotous Demonstrations,* 40 NOTRE DAME LAW 499, 501 (1965).

[2] It started one evening when 350 young ghetto residents came to a rally to see and listen to Stokely Carmichael. Circulars had been distributed to the ghetto residents stating that Carmichael would be the featured speaker at a rally called to demand the dismissal of a Louisville patrolman. Actually, the circulars were a "come-on" to attract a crowd. Members of the Black Unity League of Kentucky who organized the rally knew that Carmichael would not appear. At the rally, a rumor was started by James Cortez, a self-proclaimed volunteer worker for the Student Nonviolent Coordinating Committee, who climbed upon the top of his car and said, "I am Stokely's right hand-man. Stokely wanted to be here, but another honky [white man] trick is keeping Stokely out of Louisville." By this time, twenty-five teenagers were perched atop buildings in the area to observe the rally. After several speeches, part of the crowd chanted, "Black power, black power, black is beautiful." After more speeches which were drowned out by shouts, *it happened.* A soft drink bottle was tossed from the top of a building. Store windows were broken. Police cars rushed to the scene. Several of the cars were struck with rocks and bottles as officers emerged from them *with guns drawn.* "Man, when I saw those guns, it was all over," a fifteen year old said. "That's when I started throwing." A few minutes later, a band of about twenty youths went after an empty police captain's car. They rocked it back and forth in almost *joyous* fashion until it finally turned over; later it was set afire. By now, the atmosphere was *festive,* almost *carnival-like.* Two taxicabs were overturned and set afire in the minutes that followed. "Oh baby, it's finally here. It's really happening," several youths were heard to say as the rioting spread from the intersection. The Courier-Journal & Times, June 16, 1968, § A, 8, cols. 1, 2, 3, 4, 5, 6. (emphasis added.)