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# An Examination of the "Arising out of" and the "in the Course of" Requirements Under the Minnesota Workers' Compensation Law

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# AN EXAMINATION OF THE "ARISING OUT OF" AND THE "IN THE COURSE OF" REQUIREMENTS UNDER THE MINNESOTA WORKERS' COMPENSATION LAW

by GENE P. BRADT†

*In order for an injured employee to receive a workers' compensation award, the injury must "arise out of and in the course of employment." Use of this simple phrase has resulted in substantial uncertainty when applied on a case-by-case basis. The purpose of this Article is to eliminate some of this confusion by demonstrating that the law interpreting the arising out of and in the course of clause is readily reducible to principles and rules. After tracing the history and rationale of workers' compensation, Mr. Bradt discusses the various methodologies used to interpret the arising out of an in the course of requirement. He then examines in detail often recurring "time and place" and "employee activity" problems and suggests general rules to handle compensation problems that occur under these headings.*

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## I. INTRODUCTION

"The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can,

in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute."

Lord Wrenbury in *Herbert v. Samuel Fox & Co.*, [1916] 1 A.C. 405, 419.

"The statutory phrase 'arising out of and in the course of employment,' which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific."

Mr. Justice Murphy in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479 (1947) (footnote omitted).

Because of the increasing number of work-related injuries during the Industrial Revolution, an equitable system for compensating injured employees was needed.<sup>1</sup> Although the early American

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1. S. HOROVITZ, CURRENT TRENDS IN BASIC PRINCIPLES OF WORKMEN'S COMPENSATION 466-69 (1947). For a general discussion of public dissatisfaction with the handling of work-related accidents in the nineteenth century, see *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911).

Numerous theories have been put forth to explain the reasons for the adoption of workers' compensation statutes. Several authorities have indicated that workers' compensation laws were established after society realized the need for social insurance. See, e.g., Riesenfeld, *Forty Years of American Workmen's Compensation*, 35 MINN. L. REV. 525 (1951). In this thought-provoking Article, Professor Riesenfeld states:

Workmen's compensation is basically a branch of social insurance. . . . The real characteristic of social insurance is the fact that the worker is entitled to the benefits as a matter of right, irrespective of need; that the hazard which is involved is a typified hazard of modern society: loss or reduction of earning power; and that there is a certain standardization of benefits and de-technicalization in the procedure.

*Id.* at 530 (footnotes omitted). See also P. NONET, ADMINISTRATIVE JUSTICE (1969). Nonet quotes the 1915 chairman of the California Industrial Accident Commission as writing that workers' compensation is founded on the

incontrovertible principle that society has the right to protect itself from those influences which tend to force large numbers of persons below the poverty line, thereby making them a menace to social order and social safety. This is why society has said to its industries that they must take care of their own killed and wounded.

*Id.* at 18-19.

Professor Larson has suggested that the theory supporting workers' compensation is that it is a mechanism of

providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20, at 5 (1978). Professor Schneider concurs with this analysis. He believes that workers' compensation statutes were meant "to shift the burden of accidental injuries from the workmen to the industry

tort system provided compensation to some injured employees, the common law's three evil sisters—contributory negligence,<sup>2</sup> the fel-

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rather than on society as a whole, and to treat the cost of personal injuries incidental to the employment as a part of the cost of the business . . . ." 1 W. SCHNEIDER, WORKMEN'S COMPENSATION § 3, at 3-5 (perm. ed. 1941) (footnotes omitted).

Professors Blum and Kalven have suggested that workers' compensation legislation came about as a "fringe benefit" of labor contracts:

Workmen's compensation can best be understood as a kind of "fringe benefit" incorporated by law into the basic employment contract. The law in effect compelled the employer to provide, as a term of employment, an industrial accident policy for his employees.

Several strands of thought support this perspective. In his highly regarded case book on Agency, Roscoe Steffen groups materials so as to place workmen's compensation as part of the employment relationship. He suggests that the legal history of personal injuries to employees could easily have been different—that courts could readily have handled the whole problem as an aspect of the employee's indemnity action against the employer for losses incurred in the course of an agency relationship. There is a contemporary analogue in the tendency today to use workmen's compensation as a base, and through collective bargaining to expand the benefits to cover unemployment, sickness and accidents off work. What we wish to emphasize is that this continuum from statutory benefits to collective bargaining agreements can be read backwards, so as to view the whole as a part of the employer-employee contract. The distinctive quality is that each of these forms of coverage is tied in to the employment nexus.

W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 26-27 (1965) (footnotes omitted).

Professor Boyd has suggested yet another approach. Because work-related injuries are a constant occurrence directly associated with the cost of production, the employer should bear the total cost of production including compensating employees for their injuries. See J. BOYD, A TREATISE ON THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN UNDER MODERN INDUSTRIAL STATUTES § 5, at 12 (1913).

Finally, at least two commentators have suggested that workers' compensation schemes were enacted to meet the needs of big business as much as those of injured employees. See Lubove, *Workmen's Compensation and the Prerogatives of Voluntarism*, 8 LAB. HIST. 254, 259 (1967); Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156, 160-61 (1967).

2. The rule of contributory negligence was established in *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In that case, a plaintiff was injured by an obstruction in the road. Judge Bayley concluded that because the plaintiff would have seen the obstacle if he used ordinary care, he could receive no recovery. *Id.* at 927.

Later English cases that develop the doctrine include *Bridge v. Grand Junction Ry.*, 150 Eng. Rep. 1134 (Exch. Ch. 1838) and *Davies v. Mann*, 152 Eng. Rep. 588 (Exch. Ch. 1842).

During the Industrial Revolution, the contributory negligence doctrine was so well-established that the Pennsylvania court stated: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties." *Railroad Co. v. Aspell*, 23 Pa. 147, 149-50 (1854).

For a general discussion of the comparative negligence doctrine, see C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL (rev. ed. 1978) (primarily Wisconsin law); V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974) (text of the various statutes and good bibliography); G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951); Flem-

low-servant rule,<sup>3</sup> and assumption of risk<sup>4</sup>—prevented most employees from receiving any compensation after suffering work-

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ing, *Forward: Comparative Negligence At Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976); Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953); Comment, *Net Recovery Comparative Negligence: The Reasonable Alternative*, 6 WILLAMETTE L.J. 551 (1970).

For a history of the contributory negligence doctrine in Minnesota, see Note, *Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109, 158 n.297 (1979).

3. In 1837 Lord Abinger invented the fellow servant exception to the rule of a master's vicarious liability in *Priestley v. Fowler*, 150 Eng. Rep. 1030 (Exch. Ch. 1837). The fellow servant rule found its way into American common law in Chief Justice Shaw's famous opinion in *Farwell v. Boston & Worcester R.R.*, 45 Mass. 49 (1842). Under the fellow servant rule, the employee assumed as a matter of law the risk that his fellow employees would be negligent. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80, at 528-29 (4th ed. 1971). Minnesota apparently adopted the fellow servant rule in *Foster v. Minnesota Central Ry.*, 14 Minn. 360, 363-64 (Gil. 277, 280-81) (1869).

In its earlier decisions, the Minnesota Supreme Court indicated that the rationale for the fellow servant rule was that the master did not undertake to protect employees against the negligence of coemployees, and that it would promote the safety of the public and of all employees to make each employee watchful of the conduct of all employees. See *Brown v. Winona & St. P. R.R.*, 27 Minn. 162, 164, 6 N.W. 484, 485 (1880) (employer not an insurer); *Foster v. Minnesota Central Ry.*, 14 Minn. at 362 (Gil. at 279-80). Subsequently, the Minnesota court indicated that

the true reason for its adoption was an economic one, in order to foster industries by relieving the master from liability to any of his employees for personal injuries due to the negligence of any other of his employees in the same industry. The injustice of making this exception to the rule of respondeat superior is obvious, thus compelling those who receive the lease from an industry to assume its hazards to life and limb from the negligence of those over whom they have no control and in whose selection they have no voice.

*Headline v. Great N. Ry.*, 113 Minn. 74, 79-80, 128 N.W. 1115, 1116 (1910).

For a general discussion of the fellow servant doctrine, see Burdick, *Is Law the Expression of Class Selfishness?*, 25 HARV. L. REV. 349, 357-71 (1912); Powell, *Some Phases of the Law of Master and Servant: An Attempt at Rationalization*, 10 COLUM. L. REV. 1, 29-32 (1910). See also W. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 3-11 (1936). The exceptions to the fellow servant rule are well explained in W. PROSSER, *supra*, at 529-30.

4. Although *Cruden v. Fentham*, 170 Eng. Rep. 496 (1798), is thought to be the first case enunciating this defense, the doctrine received its greatest following after Lord Abinger's opinion in *Priestley v. Fowler*, 150 Eng. Rep. 1030 (Exch. Ch. 1837). See W. PROSSER, *supra* note 3, at 528-29. In defining the application of assumption of risk, Lord Abinger stated:

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master.

*Priestley v. Fowler*, 150 Eng. Rep. at 1032-33. For a general discussion of this doctrine, see Bohlen, *Voluntary Assumption of Risk* (pts. 1-2), 20 HARV. L. REV. 14, 91 (1906); Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562 (1942); Rice, *The Automobile Guest and the Rationale of Assumption of Risk* (pts. 1-2), 27 MINN. L. REV. 329, 429 (1943); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

related injuries.<sup>5</sup> Due to the inequities abounding in the tort-based compensation system, Prussia began a limited workers' compensation system in 1838.<sup>6</sup> Thus, the first compensation system was established a mere four years before Chief Justice Shaw established the assumption of the risk defense,<sup>7</sup> and only one year after Lord Abinger established the fellow-servant rule.<sup>8</sup>

The American response to the plight of injured workers, however, was slower and less direct.<sup>9</sup> Through case law and the enactment of employer liability statutes, the defenses of contributory

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5. See, e.g., W. DODD, *supra* note 3, at 1-52; 1 A. LARSON, *supra* note 1, § 4.30. See also Reel, *Administrative Juries: A New Proposal for Workmen's Compensation Cases in Oregon*, 1975 INS. L.J. 294. One noted authority has stated that prior to the enactment of workers' compensation legislation, 80% of all employee versus employer personal injury cases were lost or uncompensated. In the remaining 20%, the doctor's bills, lawyer's fees and other expenses "often ate up a substantial portion of the award." See S. HOROVITZ, *supra* note 1, at 467 & n.3 (citing W. DODD, *supra* at 21-22).

6. In outlining the history of the Prussian workers' compensation system, Professor Larson states:

In 1838 . . . Prussia enacted a law making railroads liable to their employees (as well as passengers) for accidents from all causes except acts of God and negligence of the plaintiff. In 1854 Prussia required employers in certain industries to contribute one-half to the sickness-association funds formed under various local statutes. In 1876 an unsuccessful voluntary insurance act was passed, and finally, in 1884, Germany adopted the first modern compensation system, thirteen years before England, twenty-five years before the first American jurisdiction, and sixty-five years before the last American state.

1 A. LARSON, *supra* note 1, § 5.10, at 33.

The Prussian workers' compensation system, however, can be traced back prior to an early Prussian law that provided:

The master was liable for the *wergeld* of the workman if the latter lost his life in the service, and for the appropriate money-payment if he was injured, —so far as the injury could not be imputed to some third person for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a tree or of fire or of water, the accident was imputed to the master as *homicidium*. If one person sent another away or summoned him on the former's business and the latter lost his life while executing the order, the former was taken as the *causa mortis*.

Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 n.6 (1894) (emphasis in original) (citations omitted).

7. *Farwell v. Boston & Worcester R.R.*, 45 Mass. 49 (1842). For a discussion of the assumption of risk defense, see note 4 *supra*.

8. *Priestley v. Fowler*, 150 Eng. Rep. 1030 (Exch. Ch. 1837). For a discussion of the fellow servant rule, see note 3 *supra*. The following scholarly works examine the history of workers' compensation laws: Grillo, *Fifty Years of Workmen's Compensation—An Historical Review*, 38 CONN. B.J. 239 (1964); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952); Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. 231 (1952); Moreland, *The General Development of Workmen's Compensation Acts* (pt. 1), 13 KY. L.J. 20 (1924); Tousant, *History, Diagnosis and Prognosis of the Workmen's Compensation Law*, BOSTON B.J., Apr. 1957, at 9.

9. See 1 A. LARSON, *supra* note 1, § 5.20.

negligence, assumption of risk, and the fellow-servant rule were at least partially abrogated.<sup>10</sup> Although Georgia passed a limited compensation statute as early as 1855,<sup>11</sup> the British Employer's Liability Act of 1880<sup>12</sup> and the 1908 Federal Employer's Liability Act,<sup>13</sup> both of which made railroad employers liable for the negligence of their officers, agents, and employees, became the watersheds of their time.<sup>14</sup> Subsequently, all states enacted workers' compensation legislation.<sup>15</sup> In so doing, most state statutes, in-

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10. *See, e.g.*, W. PROSSER, *supra* note 3, at 529-30. Professor Larson also notes that many of the tort barriers that prevented injured employees from recovering at common law had been partially struck down either by case law or by legislation prior to the inception of workers' compensation. Professor Larson suggests that this "precompensation legislation" did no more than restore "the employee to a position no worse than that of a stranger injured by the negligence of the employer or his servants." 1 A. LARSON, *supra* note 1, § 4.50. He concludes, however, that such precompensation legislation did not adequately protect employees and that "some entirely new principle was needed." *Id.* at 31.

11. 1 A. LARSON, *supra* note 1, § 4.50, at 30. This act only applied to railroads. *Id.*

12. Employer's Liability Act, 1880, 43 & 44 Vict., c. 42. For an examination of the effect of this statute in the United States, see W. DODD, *supra* note 3, at 11-16.

13. Federal Employer's Liability Act of 1908, Pub. L. No. 60-100, ch. 149, 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51-60 (1976)). Although the first federal act was enacted in 1906, its effects were limited to common carriers engaged in interstate commerce, the District of Columbia, and the territories of the United States. *See* Employers' Liability Cases, 207 U.S. 463, 500 (1908). The 1908 Act covered employees of common carriers for injuries sustained in interstate and foreign commerce. By 1910 most states had some form of employer liability legislation. *See* W. DODD, *supra* note 3, at 13-14. Because such acts still required proof of fault on the part of the employer, however, many employees suffered injuries and went uncompensated. *See id.*

14. *See* 1 A. LARSON, *supra* note 1, § 4.50, at 29-31.

15. *See id.* § 5.30 ("By 1920 all but eight states had adopted compensation acts, and on January 1, 1949, the last state, Mississippi, came under the system.")

At first, the constitutionality of such acts was questioned. The first Maryland statute, which provided for an accident fund for miners, was held unconstitutional in an unappealed lower court decision. *See* Franklin v. United Rys. & Elec. Co., 2 Baltimore City Rep. 309 (1904). The leading United States Supreme Court decision upholding the constitutionality of a state workers' compensation act is *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). In that case, the Supreme Court upheld the constitutionality of the New York compensation act on the theory that there was a "trade off" of tort for compensation liability. *See id.* at 201. Few courts have had difficulty in deciding that state workers' compensation acts in their entirety, or specific portions thereof, are constitutional.

The United States Supreme Court has consistently rejected arguments that workers' compensation acts are unconstitutional. *See, e.g.*, *Boston & Maine R.R. v. Armbrugg*, 285 U.S. 234, 237 (1932) (employer contended that act was unconstitutional because it denied employer certain common law defenses); *Booth Fisheries Co. v. Industrial Comm'n*, 271 U.S. 208, 209 (1926) (employer argued that act limited judicial review); *Madera Sugar Pine Co. v. Industrial Accident Comm'n*, 262 U.S. 499, 500-01 (1923) (employer argued that act deprived one of property without due process by requiring benefit payments to nonresident alien dependents); *Ward & Gow v. Krinsky*, 259 U.S. 503, 506-07 (1922) (employer argued that act compelling coverage by employers with more than a stated number of employees was unconstitutional); *Lower Vein Coal Co. v. Industrial Bd.*, 255 U.S. 144,

cluding the 1913 Minnesota Act,<sup>16</sup> borrowed an important phrase from the 1897 English workers' compensation statute.<sup>17</sup> As a condition precedent to recovery, these statutes required employees to prove that they suffered an injury "arising out of and in the course

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146 (1921) (employer contended that act including only certain classes of employers such as coal companies was unconstitutional); Arizona Employers' Liability Cases, 250 U.S. 400, 420 (1919) (principal contention of employers was that liability without fault was unconstitutional); Middleton v. Texas Power & Light Co., 249 U.S. 152, 156 (1919) (employee argued that act excepting from coverage certain employees such as farm laborers was unconstitutional). *But cf.* Gallegos v. Glaser Crandell Co., 388 Mich. 654, 668, 202 N.W.2d 786, 791 (1972) (according special treatment and classification to employees of agricultural employer not accorded any other employer "is impermissible, clearly discriminatory, and has no rational basis").

The Minnesota Supreme Court has also sustained the Minnesota act against various constitutional challenges. *See, e.g.*, Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949) (act is adequate substitute for employee's right to sue for all damages); Ruud v. Minneapolis St. Ry., 202 Minn. 480, 279 N.W. 224 (1938) (act does not violate equal protection provisions of federal or Minnesota constitutions); Thornton Bros. v. Northern States Power Co., 151 Minn. 435, 186 N.W. 863 (1922) (provision making third persons liable for attorney fees in subrogation cases is constitutional); State *ex rel.* London & Lancashire Indem. Co. v. District Court, 139 Minn. 409, 166 N.W. 772 (1918) (provision creating conclusive presumption of widow's dependency upon husband constitutional); Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916) (application of act to certain cases involving interstate commerce by water does not make act unconstitutional in absence of federal regulation); Mathison v. Minneapolis St. Ry., 126 Minn. 286, 148 N.W. 71 (1914) (exclusion of certain employers and employees from operation of act within legislative discretion).

On occasion, however, certain provisions of the Minnesota act have been found unconstitutional. *See* Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974) (abrogation of third party common law indemnity rights unconstitutional); Stevens v. Village of Nashwauk, 161 Minn. 20, 200 N.W. 927 (1917) (provision allowing volunteer fire departments to determine for themselves whether to come within act is unconstitutional).

Most recently, in Tracy v. Streater/Litton Indus., 283 N.W.2d 909 (Minn. 1979), the supreme court held that section 176.021, subdivision 3, which allows payment of workers' compensation benefits for both permanent partial disability and either temporary total, temporary partial, or permanent total disability, did not deny employers constitutional due process by permitting an award for a functional loss as well as for a loss of earning capacity. *See id.* at 913-16.

For an examination of the elaborate constitutional law arguments provoked by the early acts, see S. HOROVITZ, *supra* note 1, at 465-71; S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 12-16 (1944); Daffer, *The Effect of Federal Treaties on State Workmen's Compensation Laws*, 107 U. PA. L. REV. 363 (1959); 13 OKLA. L. REV. 44, 44-46 (1960).

16. *See* Act of Apr. 24, 1913, ch. 467, 1913 Minn. Laws 675.

17. *See* Workmen's Compensation Act, 1897, 60 & 61 Vict., c. 37, § 1. Under this Act, employer liability for work-related injuries "depended not on who was at fault for the accident, but on whether it arose out of the employment, while the employer was engaged therein." S. HOROVITZ, *supra* note 1, at 469. A brief sketch of the political struggles over the enactment of workers' compensation acts is set out in Riesenfeld, *supra* note 1, at 525-29.

of employment."<sup>18</sup>

Although at first blush this phrase appears simply worded, it has been said that these words are "deceptively simple and litigiously prolific,"<sup>19</sup> and, as Lord Wrenbury succinctly noted, "give rise to a mass of refinements so subtle as to leave the mind of the reader in a maze of confusion."<sup>20</sup> Despite the litigation fostered by the arising out of and in the course of requirements, the present Minnesota Workers' Compensation Act retains these often misunderstood terms.<sup>21</sup> The statute places the burden of proving these cumula-

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18. See 1 A. LARSON, *supra* note 1, § 6.10. "Forty-two states, and the Longshoremen's and Harbor Workers' Compensation Act, have adopted the entire British Compensation Act formula: injury 'arising out of and in the course of employment.'" *Id.* Minnesota is included. MINN. STAT. § 176.021(1) (1978). Utah's statute changes the formula to "arising out of or in the course of" employment. UTAH CODE ANN. § 35-1-45 (1974) (emphasis added). West Virginia's statute reads: "in the course of and resulting from their covered employment . . ." W. VA. CODE § 23-4-1 (1978). Wisconsin provides compensation "[w]here, at the time of the injury, the employee is performing a service growing out of and incidental to his employment." WIS. STAT. ANN. § 102.03(c)(1) (West 1973). Ohio, Pennsylvania, Texas, and Washington have discarded the "arising out of" idea altogether. See OHIO REV. CODE ANN. § 4123.54 (Page Supp. 1979) ("Every employee, who is injured or who contracts an occupational disease . . . contracted in the course of employment . . . is entitled to receive . . . compensation."); PA. STAT. ANN. tit. 77, § 431 (Purdon Cum. Supp. 1980-1981) ("Every employer shall be liable for compensation for personal injury to, or for the death of each employee, by an injury in the course of his employment."); TEX. REV. CIV. STAT. ANN. art. 8306, § 3b (Vernon 1967) ("If an employé . . . sustains an injury in the course of his employment."); WASH. REV. CODE ANN. § 51.32.010 (Cum. Supp. 1980-1981) ("Each worker injured in the course of his or her employment.").

Regardless of the specific language connecting the injury to the employment, it would appear that some type of link between the employment and the injury is necessary for a state workers' compensation statute to be constitutional. See *Cudahy Packing Co. v. Parmore*, 263 U.S. 418, 423 (1923) ("It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly unreasonable and arbitrary as to subject it to the ban of the Constitution . . .").

19. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947) (footnote omitted).

The difficulties inherent in attempting to formulate an all-inclusive definition of the phrase has perplexed courts and commentators since its inception. In fact one commentator observed that "definitions and formula only multiplied the difficulties." Horovitz, *Modern Trends in Workmen's Compensation*, 21 IND. L.J. 473, 497-98 (1946). Indeed, the Minnesota Supreme Court specifically refused to give an all-inclusive definition in *Novack v. Montgomery Ward & Co.*, 158 Minn. 495, 198 N.W. 290 (1924), when it stated:

We have heretofore declined to attempt to give a comprehensive definition of this language which should include all cases embraced therein and with precision exclude those outside of its terms. We shall not attempt to do so now. It is sufficient to say that each case that comes to us must stand on its own facts.

*Id.* at 498, 198 N.W. at 292.

20. *Herbert v. Samuel Fox & Co.*, [1916] 1 A.C. 405, 419.

21. MINN. STAT. § 176.021(1) (1978).

tive requirements on the employee.<sup>22</sup>

At least two reasons exist for a scholarly analysis of these requirements. First, a comprehensive analysis of this topic, with special emphasis on Minnesota law, has never been undertaken. Second, a critical examination of the Minnesota court's interpretation of the arising out of and in the course of requirements may indicate a substantial deviation from prior well-reasoned constructions of this phrase. If this deviation exists, a determination of the point of departure from prior law is essential to an understanding of how this phrase is presently construed.

The focus of this Article is three-fold. First, the meaning of the terms arising out of and in the course of will be analyzed by examining the guidelines that have been established to assist in the proper application of the terms.<sup>23</sup> Second, often-recurring time and place problems will be examined, and suggested general rules to handle compensation problems that occur under these headings will be offered.<sup>24</sup> Finally, similar treatment will be given to compensation questions arising from employee activity problems.<sup>25</sup>

## II. AN OVERVIEW OF THE "ARISING OUT OF" AND THE "IN THE COURSE OF" REQUIREMENTS

### A. *Interpreting the "Arising Out of" Requirement*

Although the phrase "arising out of" refers to the causal connection between the employment and the injury, at least five different lines of reasoning have been used to explain this often misunderstood term.<sup>26</sup> First, some courts have used the peculiar-risk doctrine to interpret their statutes.<sup>27</sup> Formerly the dominant rule,<sup>28</sup>

22. See, e.g., *MacNamara v. Jennie H. Boyd Trust*, 287 Minn. 163, 166, 177 N.W.2d 398, 400 (1970) (burden of proof rests upon claimant); *Ulve v. Bemidji Coop. Creamery Ass'n*, 267 Minn. 412, 419, 127 N.W.2d 147, 152 (1964) (burden of proving causal relationship rests with employee); *Gerhardt v. Welch*, 267 Minn. 206, 210, 125 N.W.2d 721, 724 (1964) ("burden rests on petitioner to establish . . . the causal connection between the compensable injury and subsequent death" (footnote omitted)).

23. See notes 26-79 *infra* and accompanying text.

24. See notes 80-308 *infra* and accompanying text.

25. See notes 309-558 *infra* and accompanying text.

26. See 1 A. LARSON, *supra* note 1, §§ 6.10-60.

27. *Id.* § 6.20. In *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935), the employee, a laborer, sought compensation for the loss of his right leg, which resulted from freezing his right foot while working in cold weather. In denying compensation, the Massachusetts court stated: "there is nothing to show that the employee was exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather." *Id.* at 546, 198 N.E. at 761.

28. See 1 A. LARSON, *supra* note 1, § 6.20.

this approach required injured employees to prove that the harm causing their injuries was peculiar to the job being performed at the time of injury.<sup>29</sup> Thus, even if the employment increased the possibility of injury by lightning<sup>30</sup> or other forces of nature,<sup>31</sup> an injured employee might be denied compensation if a court concluded that all humanity was exposed to similar dangers.<sup>32</sup> Because of the potential harshness resulting from its application, the peculiar-risk doctrine is now virtually obsolete.<sup>33</sup>

Second, many early courts applied a proximate cause test when interpreting a statute's arising out of requirement.<sup>34</sup> Under this

29. *See id.*

30. *See* Netherton v. Lightning Delivery Co., 32 Ariz. 350, 355, 258 P. 306, 308 (1927) (when the employee, by reason of employment, "is more exposed to injury by lightning than are others in the same locality and not so engaged, the injury may be said to arise out of the employment"); Wells v. Robinson Constr. Co., 52 Idaho 562, 567, 16 P.2d 1059, 1060 (1932) ("if it is not shown that the workman was exposed by reason of his employment to a danger greater than, or not common to, others in that locality, his accidental death or injury by lightning stroke or the elements is not compensable"), *overruled*, Mayo v. Safeway Stores Inc., 93 Idaho 161, 164-65, 457 P.2d 400, 403-04 (1969) (applying positional-risk test court overruled earlier decision); Fuqua v. Department of Highways, 292 Ky. 783, 785, 168 S.W.2d 39, 39-40 (1943) (injury "arises out of" only if "employment exposes the servant to peculiar danger and risk of being struck by lightning, greater than that to which others of the public are exposed . . .").

31. *See* Pattiani v. Industrial Accident Comm'n, 199 Cal. 596, 603, 250 P. 864, 866 (1926) (fact that city suffered from typhoid fever epidemic at time claimant was there constituted an exposure or risk common to all and not peculiar to or characteristic of employment).

32. *See* 1 A. LARSON, *supra* note 1, § 6.20.

33. *See id.* §§ 6.20-30.

34. *See id.* § 6.60.

One important decision adopting this theory is Madden's Case, 222 Mass. 487, 111 N.E. 379 (1916), in which the court stated, "The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." *Id.* at 495, 111 N.E. at 383. As late as 1974, the Tennessee Supreme Court denied compensation benefits apparently on the theory of proximate cause. *See* Hill v. St. Paul Fire & Marine Ins. Co., 512 S.W.2d 560 (Tenn. 1974). In *Hill* the employee, a night watchperson, was crushed by the collapse of a building hit by a tornado. In denying compensation, the court stated: "His employer by the exercise of reasonable foresight could not have reasonably anticipated a tornado as a result of Hill's employment." *Id.* at 562. The North Carolina Supreme Court appears to have also briefly returned to this theory in *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972). In *Robbins* fellow employees at a grocery store were murdered by the jealous husband of one of the decedents. The jealous husband and his wife were having marital problems, one problem being the wife's employment at the grocery store. The court reversed an award of compensation in part because the employer could not reasonably foresee this type of harm to an employee. *See id.* at 242, 188 S.E.2d at 356.

In at least one recent case, the Minnesota court appeared to use the proximate cause theory. In *Epp v. Midwestern Mach. Co.*, 296 Minn. 231, 208 N.W.2d 87 (1973), an over-

approach, two requirements had to be met: the injury producing harm had to be a foreseeable hazard of the claimant's employment;<sup>35</sup> and, there could be no intervening cause breaking the chain of causation leading to the injury.<sup>36</sup> Some courts applying this approach held that work-related injuries, when caused by "acts of God," were never compensable because these acts were intervening causes.<sup>37</sup> Fortunately, this theory has few adherents today.<sup>38</sup>

Third, some courts have formulated what Professor Larson refers to as an "actual risk" doctrine.<sup>39</sup> This rather liberal theory supposedly does not consider whether there is something about the employment that increases an employee's exposure to the injury beyond that of the public generally or the employee apart from the work.<sup>40</sup> Instead, the focus of this approach centers on whether

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the-road truck driver was required to lay over because the return shipment would not be released immediately. The employee was killed at 2:30 a.m. walking back from a tavern to his motel. In upholding an award of compensation, the court stated:

The commission surmised that employee "to pass some time—during a considerably long waiting period—crossed the road to the tavern and had some drinks until closing time." The record, therefore, is sufficient to support the conclusion that the employer contemplated, because of the work schedule of the employee, that he would be exposed to the hazards of being upon a highway at any hour of the day or night, either driving his truck or having to cross it for meals, refreshments, or to return to his motel room. Accordingly, we cannot say that employee's activity was unreasonable and that the risk to which he was exposed did not directly flow as a natural incident of his employment under the circumstances of this case.

*Id.* at 234-35, 208 N.W.2d at 89 (emphasis added).

35. 1 A. LARSON, *supra* note 1, § 6.60.

36. *Id.*

37. *Id.* § 6.60, at 3-6 & n.13.

38. *See id.* § 6.60.

39. *See id.* §§ 6.40, 8.43. For an example of a case directly adopting Professor Larson's "actual risk" theory, see *Crane Rental Serv. v. Rutledge*, 219 Tenn. 433, 410 S.W.2d 418 (1966). Several cases also appear to use this theory, but do not refer to it by name. *See Harding Glass Co. v. Albertson*, 208 Ark. 866, 868-69, 187 S.W.2d 961, 962 (1945) ("we think the better rule . . . is that a heat prostration . . . sustained by a workman or employee, while engaged in the employment . . . whether due to unusual or extraordinary conditions or not, is deemed an accidental injury"); *Hughes v. Trustees of Saint Patrick's Cathedral*, 245 N.Y. 201, 202-03, 156 N.E. 665, 665 (1927) ("Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."); *Deziley v. Semet-Solvay Co.*, 272 A.D. 985, 985, 72 N.Y.S.2d 809, 810 (1947) ("It cannot be gainsaid but that decedent's employment exposed him to the hazard which was his undoing, and in such a case . . . that characterizes the fatal accident as one arising out of the employment."); *Eagle River Bldg. & Supply Co. v. Industrial Comm'n*, 199 Wis. 192, 196, 225 N.W. 690, 691 (1929) ("It makes no difference that the exposure was common to all out-of-door employments in that locality in that kind of weather. The injury grew out of that employment and was incidental to it. It was a hazard of the industry.").

40. *See* note 39 *supra*.

the harm was in fact caused by a risk of employment at the time of injury.<sup>41</sup> If the injury is found to have been caused by a risk of employment, compensation is proper even if the injury is caused by an act of God.<sup>42</sup>

Fourth, Professor Larson indicates that a few courts have adopted a positional-risk test.<sup>43</sup> Under this test, compensation is appropriate if an injury occurs because the claimant's employment resulted in placement where the injury occurred.<sup>44</sup> Although few jurisdictions have totally accepted this view,<sup>45</sup> it has been used to justify compensation on a regular basis in raving lunatic<sup>46</sup> and stray bullet<sup>47</sup> situations. Additionally, positional risk is the com-

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41. *See id.*

42. *See id.*

43. *See* 1 A. LARSON, *supra* note 1, § 6.50. Although none of the cases Professor Larson refers to have expressly used the words "positional risk," a few of the cases appear to use this theory without referring to it by name. *See* *Aetna Life Ins. Co. v. Industrial Comm'n*, 81 Colo. 233, 234, 254 P. 995, 995 (1927) ("since Oakley's employment required him to be in a position where the lightning struck him, there was a causal relation between employment and accident, so that the latter may be said to arise out of the former and therefore the judgment should be affirmed"); *Harvey v. Caddo De Soto Cotton Oil Co.*, 199 La. 720, 6 So. 2d 747 (1942). The *Harvey* court commented:

And, when one finds himself at the scene of [the] accident, not because he voluntarily appeared there but because the necessities of his business *called him there*, the injuries he may suffer by reason of such accident 'arise out of' *the necessity* which brought him there, and hence 'arise out of' his employment, if it so be that he was *employed* and his employment required him to be at the place of the accident at the time when the accident occurred.

In determining, therefore, whether an accident 'arose out of' the employment, it is necessary to consider only this: (1) Was the employee then engaged about his employer's business and not merely pursuing his own business or pleasure; and (2) did the necessities of that employer's business reasonably require that the employee be at the place of the accident at the time the accident occurred?

. . . It was his employer's business which called him to the place and time of the accident and not his own pleasure or business; and hence his injuries arose out of his pursuit of his employer's business . . . .

*Id.* at 730, 6 So. 2d at 750 (emphasis in original) (quoting *Kern v. Southport Mill*, 174 La. 432, 438-39, 141 So. 19, 21 (1932)).

44. *See* note 43 *supra*.

45. *See* 1 A. LARSON, *supra* note 1, § 6.50.

46. *Id.*; *see, e.g.*, *Travelers Ins. Co. v. Hampton*, 414 S.W.2d 712, 715 (Tex. Civ. App. 1967) (analyzing several cases awarding compensation in "lunatic" situations).

47. 1 A. LARSON, *supra* note 1, § 6.50; *see* *Christiansen v. Hill Reproduction Co.*, 262 A.D. 379, 29 N.Y.S.2d 24 (1941), *aff'd*, 287 N.Y. 690, 39 N.E.2d 300 (1942). The *Christiansen* court commented:

We can see no reasonable or sensible distinction between the case of an employee, at the time engaged on the mission of his employer, who comes to his death by the bullet of a gunman on the public highway and one who, likewise employed, meets the identical fate in a public tavern. . . . He lost his life through the act of a lunatic or a criminal at a place where his employer directed him to be for the purpose of promoting the latter's interests.

monly accepted basis for street-risk coverage.<sup>48</sup>

Finally, most jurisdictions have adopted the increased-risk doctrine.<sup>49</sup> Under this approach, compensation is proper if two requirements are met: the injury must arise out of a hazard increased by the employment;<sup>50</sup> and, such injury cannot be common to the public in general.<sup>51</sup>

Minnesota cases appear to require the employee to satisfy the increased-risk doctrine,<sup>52</sup> except in street-risk cases when the positional-risk test is used.<sup>53</sup> Under the Minnesota approach, the increased-risk test is satisfied if there is something, a condition or incident,<sup>54</sup> about the employment that increases the employee's exposure to the injury beyond that of the public generally<sup>55</sup> or the

262 A.D. at 384-85, 29 N.Y.S.2d at 29.

48. Street risks include all perils normally associated with a street. "Under this test, if the employment occasions the employee's use of the street, the risks of the street are the risks of the employment, and . . . [i]t is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the street." 1 A. LARSON, *supra* note 1, § 9.40 (footnote omitted).

In *Bookman v. Lyle Culvert & Road Equip. Co.*, 153 Minn. 479, 190 N.W. 984 (1922), the court indicated that it has

definitely committed itself to the doctrine that an injury to an employe, engaged in his employer's service in a duty calling him upon the street, by what is usually called a street risk to which his work subjects him, arises as a matter of law out of his employment, although others so employed, or the public using the streets, are subject to such risks.

*Id.* at 481, 190 N.W. at 984.

For a general discussion of the street-risk doctrine, see 1 A. LARSON, *supra*, §§ 9.00-.50; 6 W. SCHNEIDER, *supra* note 1, §§ 1694-1697.

49. 1 A. LARSON, *supra* note 1, § 6.30, at 3-4 & nn.10-10.1; see *Reich v. A. Reich & Sons Gardens, Inc.*, 485 S.W.2d 133 (Mo. App. 1972) (employee's presence in field during storm increased risk of injury).

50. See 1 A. LARSON, *supra* note 1, §§ 8.41-42.

51. See *id.*

52. See, e.g., *Fisher v. Fisher*, 226 Minn. 171, 32 N.W.2d 424 (1948) (salesman exposed to special hazard while watching client umpire baseball game); *Olson v. Trinity Lodge No. 282, A.F. & A.M.*, 226 Minn. 141, 32 N.W.2d 255 (1948) (exposure to icy sidewalk held special hazard); *Stenberg v. Raymond Coop. Creamery*, 209 Minn. 366, 296 N.W. 498 (1941) (employee's death resulting from either fall or heart attack held compensable and risk of his employment); *Lickfett v. Jorgenson*, 179 Minn. 321, 229 N.W. 138 (1930) (employee's death from lightning held a special risk).

53. See *Auman v. Breckenridge Tel. Co.*, 188 Minn. 256, 246 N.W. 889 (1933) (injury to employees from stray bullet held not in course of employment); *Bookman v. Lyle Culvert & Road Equip. Co.*, 153 Minn. 479, 190 N.W. 984 (1922) (employee injured while mailing employee's letters held in line of employment); note 48 *supra* and accompanying text.

54. See, e.g., *Olson v. Trinity Lodge No. 282, A.F. & A.M.*, 226 Minn. 141, 32 N.W.2d 255 (1948).

55. See, e.g., *id.* at 147, 32 N.W.2d at 259; *Lickfett v. Jorgenson*, 179 Minn. 321, 323, 229 N.W. 138, 138 (1930).

employee apart from the work.<sup>56</sup>

Regardless of which theory is employed it is crucial to realize that satisfying the arising out of requirement alone will not assure compensation.<sup>57</sup> Not only must an employee prove an injury arising out of employment, but the injury must also be shown to have arisen in the course of employment.<sup>58</sup>

### B. Interpreting the "in the Course of" Requirement

The "in the course of" requirement refers primarily to the time, place, and circumstances surrounding the employee's injury.<sup>59</sup> In

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56. *Fisher v. Fisher*, 226 Minn. 171, 174, 32 N.W.2d 424, 426 (1948); *Stenberg v. Raymond Coop. Creamery*, 209 Minn. 366, 371, 296 N.W. 498, 500-01 (1941).

57. Professor Schneider has commented:

[T]here must be a conjunction of the two requirements to permit a recovery of compensation. "The two elements must co-exist. They must be concurrent and simultaneous. One without the other will not sustain an award; yet the two are so entwined that they are usually considered together in the reported cases."

6 W. SCHNEIDER, *supra* note 1, § 1542, at 3-4 (footnotes omitted).

Similarly, Professor Malone comments, "[t]he requirement, then, is dual, and it must be satisfied *in toto*. It is not enough that the accident either happened during the course of employment or that it arose out of it. It must do both." Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N.C.L. REV. 705, 717 (1973) (emphasis in original).

The dual requirement concept, however, has not been without its critics. Professor Bohlen strongly urged that "all accidents occurring during the course of the employment should be covered without further inquiry." *Id.* (footnote omitted). In sharp contrast to Professor Bohlen's suggestion, is the proposed 1955 Department of Labor's Workers' Compensation Statute. This proposed model statute was released for discussion purposes only, and was the brain child of Professor Larson, then Under Secretary of Labor. That statute indicated compensation would be proper anytime the arising out of test was met. *See id.* at 717-18.

Professor Malone offers a third alternative. He suggests that the dual requirements of arising out of and in the course of may be best visualized as two circles with arising and in the course of as their centers. These circles not only overlap to give coverage, but often interact. *See id.* at 723-28. Interestingly, Professor Malone states that he and Professor Larson "arrived at this conclusion independently at about the same time. Larson's persuasive explanation is in terms of a suggested 'quantum theory.'" *Id.* at 728 n.40. For further discussion of Professor Malone's concept of overlapping and interacting compensation spheres, see Malone, *Some Recent Developments in the Substantive Law of Workmen's Compensation*, 16 VAND. L. REV. 1039, 1050-51 (1963). For a discussion of Professor Larson's "quantum theory," see 1A A. LARSON, *supra* note 1, §§ 29.00-10 (1979).

58. *See* 6 W. SCHNEIDER, *supra* note 1, § 1542; Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, *supra* note 57, at 717-18.

59. *See Swenson v. Zacher*, 264 Minn. 203, 207, 118 N.W.2d 786, 789 (1962) ("[T]he term 'in the course of' refers to the time, place, and circumstances of the accident causing the injury."). Professor Larson indicates that "[a]n injury is paid [*sic*] to arise in the course of the employment when it takes place within the period of the employment." 1A LARSON, *supra* note 1, § 14.00. Similarly, Professor Schneider states, "[i]n the course of employment points to the time, place, and circumstances under which an accident takes

Minnesota special emphasis is given to the time, place, and circumstances requirement because the statutory definition of "personal injury" provides:

"Personal injury" means injury arising out of and in the course of employment . . . but does not cover an employee except while engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service.<sup>60</sup>

Although this statute would appear to prohibit compensation unless an injury occurs on the employment premises during the regular hours and duties of employment, it has not been so construed.<sup>61</sup> Rather, any act outside an employee's regular duties is compensable if undertaken in good faith to advance the employer's interest.<sup>62</sup> This is true even if the employee's assigned

place, and simply means 'While the employment was in progress.'" 6 W. SCHNEIDER, *supra* note 1, § 1542(c), at 19-20.

60. MINN. STAT. § 176.011(16) (1978).

61. *See, e.g.*, *Blattner v. Loyal Order of Moose*, 264 Minn. 79, 117 N.W.2d 570 (1962) (allowing compensation for injury that occurred while waiting for a ride home); *Nelson v. City of St. Paul*, 249 Minn. 53, 81 N.W.2d 272 (1957) (allowing compensation for injury that occurred while walking to work); *Olson v. Trinity Lodge No. 282, A.F. & A.M.*, 226 Minn. 141, 32 N.W.2d 255 (1948) (same).

In *Blattner* the court commented:

The term "hours of service" must not be construed so narrowly as to include only that for which the worker is paid or only those moments which he actually spends at a shovel, machine, or workbench. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time of his injury.

264 Minn. at 83, 117 N.W.2d at 573 (quoting *Olson v. Trinity Lodge No. 282, A.F. & A.M.*, 226 Minn. 141, 145, 32 N.W.2d 255, 258 (1948)).

The *Nelson* court indicated:

The statutory limitation . . . that the accidental injury to be compensable must occur during the hours of service is to be given a liberal and reasonable construction so as to include during such hours a reasonable time for ingress after the employee, having put aside his own independent purposes, has come to a point which is not only immediately adjacent to the working premises but also within the range of hazards peculiarly associated with the employment.

249 Minn. at 56-57, 81 N.W.2d at 276 (emphasis in original).

62. *See, e.g.*, *Riley v. Perkins*, 282 Ala. 629, 213 So. 2d 796 (1968) (per curiam) (seller of cotton seed meal injured while unloading truck); *Employers' Liab. Assurance Corp. v. Industrial Comm'n*, 50 Ariz. 509, 73 P.2d 700 (1937) (stock boy injured while killing scorpion); *Swenson v. Zacher*, 264 Minn. 203, 118 N.W.2d 786 (1962) (cook injured while investigating backyard noises); *Beam v. State Workmen's Compensation Fund*, 261 S.C. 327, 200 S.E.2d 83 (1973) (teachers killed in automobile accident while driving to professional meeting). According to Professor Larson, "[a]n act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." 1A A. LARSON, *supra* note 1, § 27.00 (1979).

work is not being furthered.<sup>63</sup> Moreover, the time when the employee is serving the employer need not coincide with the period for which wages are paid.<sup>64</sup> The reasons for this rather liberal interpretation appear to be two-fold. First, the arising out of and in the course of requirements are liberally interpreted in favor of injured employees.<sup>65</sup> Second, a reason never expressly stated, but implicit in several cases, is that when an injury clearly arises out of employment, the in the course of requirement sometimes is relaxed.<sup>66</sup> *Nelson v. City of St. Paul*<sup>67</sup> affords an excellent illustration of how a strong arising situation can bootstrap the in the course of

63. See, e.g., *Swenson v. Zacher*, 264 Minn. 203, 210, 118 N.W.2d 786, 791 (1962) (employer's interests served by cook investigating backyard noises); 1A A. LARSON, *supra* note 1, § 27.00 (1979).

64. Professor Larson indicates that as a general rule:

Injuries incurred by an employee while leaving the premises, collecting pay, or getting his clothes or tools within a reasonable time after termination of the employment are within the course of employment, since they are normal incidents of the employment relation. Injuries before actual hiring are not compensable, but hiring is not deemed to depend on paper formalities such as signing the payroll and withholding slips.

1A A. LARSON, *supra* note 1, § 26.00 (1979).

In *Blattner v. Loyal Order of Moose*, 264 Minn. 79, 117 N.W.2d 570 (1962), the court said, "[t]he test is whether the accident occurred at a time when the employee was being of service to the employer, which may or may not coincide with the period for which wages are paid." *Id.* at 81, 117 N.W.2d at 572.

65. The Minnesota Supreme Court on numerous occasions has held that the Minnesota Workers' Compensation Act should be liberally interpreted to provide benefits for injured workers. See, e.g., *Epp v. Midwestern Mach. Co.*, 296 Minn. 231, 233, 208 N.W.2d 87, 88 (1973) (per curiam); *Sandmeyer v. City of Bemidji*, 281 Minn. 217, 221, 161 N.W.2d 318, 320 (1968); *Jonas v. Lillyblad*, 272 Minn. 299, 301, 137 N.W.2d 370, 372 (1965).

In *Epp* the court stated:

The Workmen's Compensation Act, which provides benefits for an employee's death "arising out of and in the course of employment," . . . is a highly remedial statute and should not be construed so as to deny benefits unless it clearly appears that the conduct which results in death does not come within the protection of the act.

296 Minn. at 233, 208 N.W.2d at 88 (citing *Sandmeyer* and *Jonas*).

66. Professor Malone indicates that "a very strong showing on the during-course-of side of the ledger can so operate as to offset a decided weakness on the arise-out-of side of the balance sheet." Malone, *Some Recent Developments in the Substantive Law of Workmen's Compensation*, *supra* note 57, at 1050. Cases that appear to support Professor Malone's theory include *Zytkevic v. Ford Motor Co.*, 340 Mich. 309, 65 N.W.2d 813 (1954), *Nelson v. City of St. Paul*, 249 Minn. 53, 81 N.W.2d 272 (1957), and *Meo v. Commercial Can Corp.*, 76 N.J. Super. 484, 184 A.2d 891 (Bergen County Ct. 1962), *aff'd*, 80 N.J. Super. 58, 192 A.2d 854 (App. Div. 1963). Professor Larson discusses a "quantum theory" of work-connection in which the course-of-employment and arising-out-of tests are to be applied independently, and deficiencies in the strength of one test can be made up by strength in the other test. See 1A A. LARSON, *supra* note 1, §§ 29.00-.10 (1979).

67. 249 Minn. 53, 81 N.W.2d 272 (1957).

requirement into a compensable event.<sup>68</sup> In *Nelson* the employee, a school teacher, was walking toward her schoolhouse between 8:45 and 9:00 a.m. when she sustained an injury.<sup>69</sup> Although classes began at 9:00 a.m., she was required to be at school by 8:45 a.m. to hand out school-supplied playground equipment.<sup>70</sup> Before she reached the school playground, the employee was struck by a baseball batted from within the playground.<sup>71</sup> Despite the fact that the claimant had neither reached her employer's premises nor had formally begun working, the court awarded compensation.<sup>72</sup>

Courts in other jurisdictions, at least implicitly, also have recognized that a very close relationship between the "arising out of" hazard and the worker's job may compensate for glaring shortcomings with reference to the "in the course of" requirement.<sup>73</sup> Similarly, when an accident clearly arises "in the course of" employment the "arising out of" requirement may be relaxed.<sup>74</sup>

The next two sections of this Article will analyze the most difficult and often recurring compensation problems that plague the legal scholar and practitioner in their efforts to determine whether

68. See generally 1A A. LARSON, *supra* note 1, §§ 29.00-10 (1979); Malone, *Some Recent Developments in the Substantive Law of Workmen's Compensation*, *supra* note 57, at 1049-52.

69. See 249 Minn. at 55, 81 N.W.2d at 275.

70. See *id.* at 54, 81 N.W.2d at 275.

71. See *id.* at 55, 81 N.W.2d at 275.

72. See *id.* at 58-59, 81 N.W.2d at 277.

73. For example, in *Meo v. Commercial Can Corp.*, 76 N.J. Super. 484, 184 A.2d 891 (Bergen County Ct. 1962), *aff'd*, 80 N.J. Super. 58, 192 A.2d 854 (App. Div. 1963), the injured employee was the supervisor of the employer's factory. Because of a labor dispute and ensuing strike, the injured employee was engaged in strikebreaking activities on behalf of the employer. See *id.* at 486, 184 A.2d at 892. While Meo attempted to enter his car to drive to work several disgruntled strikers assaulted and severely beat him. See *id.* at 488, 184 A.2d at 893. Although the injury occurred at home, compensation was awarded. See *id.* at 491, 184 A.2d at 895. Compare *id.* with *Corcoran v. Teamsters & Chauffeurs Joint Council No. 32*, 209 Minn. 289, 297 N.W. 4 (1941) (labor organizer, after being threatened for union activity, entitled to compensation benefits when killed at home by unknown assailant).

In *Zytkewick v. Ford Motor Co.*, 340 Mich. 309, 65 N.W.2d 813 (1954), the injured employee, a factory worker, died of cyanide poisoning. The court indicated that there was sufficient circumstantial evidence to support the view that the cyanide accidentally came in contact with decedent's body as a result of his work environment. See *id.* at 318-19, 65 N.W.2d at 818. After arriving home in apparent good health the employee died from the poisoning after undressing for bed. See *id.* at 312-13, 65 N.W.2d at 815.

74. Employee horseplay injuries provide an excellent illustration of this concept. See, e.g., *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (employee riding in truck playfully threw raincoat over windshield resulting in collision; compensation awarded). The horseplay doctrine is discussed in notes 498-536 *infra* and accompanying text.

an injury arises out of and in the course of employment.<sup>75</sup> Because in most instances the arising out of and in the course of requirements are too closely interwoven to be examined separately,<sup>76</sup> this Article will group its analysis along time and place,<sup>77</sup> and employee-activity problems.<sup>78</sup> The general rules that have been developed to alleviate the difficulties presented by these problem areas are examined below.<sup>79</sup>

### III. TIME AND PLACE PROBLEMS

#### A. The "Coming and Going" Rule

In Minnesota, as in the vast majority of jurisdictions, injuries received while going to or returning from work are generally non-compensable.<sup>80</sup> Numerous exceptions to the "coming and going"

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75. See notes 80-558 *infra* and accompanying text.

76. The Minnesota Supreme Court recognized the difficulty of examining independently each side of the "arising out of" and "in the course of" coin in *Lange v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 257 Minn. 54, 99 N.W.2d 915 (1959):

[A]s used in the Workmen's Compensation Act the term "in the course of" refers to the time, place, and circumstances of the accident, whereas the term "arising out of" relates to the causal connection between the employment and the injury. As applied in some factual situations, however, the two concepts are so closely interwoven that an attempt to adhere to technical distinctions serves little purpose.

*Id.* at 56, 99 N.W.2d at 917 (footnote omitted).

77. See notes 80-308 *infra* and accompanying text.

78. See notes 309-558 *infra* and accompanying text.

79. See notes 80-558 *infra* and accompanying text.

80. See, e.g., *Reeves v. Liberty Mut. Ins. Co.*, 50 F. Supp. 772, 773 (N.D. Tex. 1943) (applying Texas law); *Johnson v. Clark*, 230 Ark. 275, 276, 322 S.W.2d 72, 73 (1959); *Satack v. State*, 275 N.W.2d 556, 557 (Minn. 1978); *Johannsen v. Acton Constr. Co.*, 264 Minn. 540, 545, 119 N.W.2d 826, 829 (1963).

Several rationales for the coming and going rule have been expressed. First, during the travel to and from work the employer exerts no control over the employee's activities. See, e.g., *Morris v. Hermann Forwarding Co.*, 18 N.J. 195, 200, 113 A.2d 513, 515 (1955) ("Complications in the factor of employer control constituted 'one reason why compensation statutes have never attempted to cover the journey to and from work in ordinary cases.'"). Second, any exposure to the risk of travel to and from employment attaches to the claimant merely as a member of the traveling public and not as an employee. See 8 W. SCHNEIDER, *supra* note 1, § 1710, at 7. Third, the relationship of employer and employee is suspended during the time the employee travels to and from employment. See *id.* Finally, the coming and going rule represents workable line drawing in determining compensation disputes. See 1 A. LARSON, *supra* note 1, § 15.11.

Notwithstanding the above rationales, the coming and going rule has been subjected to harsh criticism. Roscoe Pound has argued:

If one had to classify this case under one of the accepted exceptions to the "going and coming rule" it would not be difficult to do so. . . . It is time the "going and coming rule" and the endless distinctions for getting around it, which have grown out of it and darken counsel in plain cases, was given up.

rule, however, have been judicially<sup>81</sup> or legislatively<sup>82</sup> created in order to avoid the sometimes harsh results that follow from its strict application.<sup>83</sup> Exceptions to the rule have been allowed when the employer regularly furnishes the employee transportation to and from work,<sup>84</sup> when the nature of the employee's job necessitates travel,<sup>85</sup> when the employee sustains an injury while traveling a route that is a reasonable ingress to or egress from the employer's premises,<sup>86</sup> and when the employee is exposed to a spe-

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Pound, *Comments on Recent Important Workmen's Compensation Cases*, 15 NACCA L.J. 45, 86-87 (1955).

Similarly, Professor Horovitz has indicated:

The rule has been a source of injustice to injured workers for many years. It has put upon them the burden of proving an exception to this narrow court-made rule. It should be abandoned in favor of deciding liberally in each case whether the journey and injury in question arose "in the course of" the employment.

Horovitz, *Workmen's Compensation: Half Century of Judicial Developments*, 41 NEB. L. REV. 1, 52 (1961). Professor Horovitz has advocated that employees should be protected "for a reasonable distance before reaching or after leaving the employer's premises." S. HOROVITZ, *supra* note 15, at 161 (emphasis in original) (footnote omitted). This view has been soundly criticized by Professor Larson because it provides no standards by which to test "reasonableness." See 1 A. LARSON, *supra*, § 15.12.

Interestingly, the coming and going rule appears to be an Anglo-American rule that has been rejected by several European countries. Professor Riesenfeld indicates that France and Germany have rejected the rule. See Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 549 (1954).

81. Professor Horovitz lists six recognized exceptions to the coming and going rule:

(1) [I]f the employee is on the way to or from work in a vehicle owned or supplied by the employer . . . ; (2) if the employee is subject to call at all hours or at the moment of injury; (3) if the employee is traveling for the employer . . . ; (4) if the employer pays for the employee's time from the moment he leaves his home to his return home; (5) if the employee is on the way home to do further work at home . . . ; (6) where the employee is required to bring his automobile to his place of business for use there.

S. HOROVITZ, *supra* note 15, at 162-65.

82. See, e.g., MINN. STAT. § 176.011(16) (1978) ("Where the employer regularly furnishes transportation to his employees to and from the place of employment such employees are subject to this chapter while being so transported."); WIS. STAT. ANN. § 102.03(1)(c)(1) (West 1973), which provides:

Every employe going to and from his employment in the ordinary and usual way, while on the premises of his employer, or while in the immediate vicinity thereof if the injury results from an occurrence on the premises, shall be deemed to be performing service growing out of and incidental to his employment . . . .

*Id.*

83. For a general discussion of the exceptions to the coming and going rule, see 1 A. LARSON, *supra* note 1, §§ 15.12-54; 8 W. SCHNEIDER, *supra* note 1, §§ 1711-1751; Note, *Workmen's Compensation—The "Going and Coming" Rule and Its Exceptions in Kentucky*, 47 KY. L.J. 420 (1959).

84. See notes 88-140 *infra* and accompanying text.

85. See notes 141-97 *infra* and accompanying text.

86. See notes 198-224 *infra* and accompanying text.

cial hazard while traveling to the employment.<sup>87</sup>

### 1. *Employer Furnished Transportation*

In *Nesbitt v. Twin City Forge & Foundry Co.*,<sup>88</sup> the employment contract specifically provided for free transportation from the end of the nearest streetcar lot to the employer's premises.<sup>89</sup> While riding to work in a conveyance furnished by the employer and under the employer's control, the employee sustained an injury.<sup>90</sup> The *Nesbitt* court, in denying compensation, based its holding on the ground that the restrictive clause in the Minnesota statute "[n]ot to cover workmen except while engaged in, on or about the premises," prevented recovery for injuries sustained while an employee rode to the employer's premises, even when riding in a conveyance furnished by the employer.<sup>91</sup> In so holding, the *Nesbitt* court recognized that the rule was otherwise in some jurisdictions that did not have such a restrictive clause,<sup>92</sup> and expressly invited legislative consideration of the matter for "the attention it merits."<sup>93</sup>

The Minnesota Legislature responded to that invitation in 1923 by adding language to the statutory predecessor of section 176.011, subdivision 16,<sup>94</sup> which, in its present form, provides: "[w]here the employer regularly furnished transportation to his employees to and from the place of employment such employees are subject to this chapter while being so transported."<sup>95</sup>

So formulated, the 1923 amendment requires that four conditions be satisfied before compensation may be awarded. First, the transportation must be "regularly furnished."<sup>96</sup> Second, the employee's injury must be traced to the employer's "transportation."<sup>97</sup> Third, the transportation must be furnished "to and from the place of employment."<sup>98</sup> Finally, the injury must have oc-

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87. See notes 225-37 *infra* and accompanying text.

88. 145 Minn. 286, 177 N.W. 131 (1920).

89. See *id.* at 288, 177 N.W. at 131-32.

90. See *id.* at 288, 177 N.W. at 132.

91. *Id.* at 290-91, 177 N.W. at 132-33.

92. See *id.* at 290, 177 N.W. at 132.

93. *Id.* at 291, 177 N.W. at 133.

94. See Act of Apr. 27, 1923, ch. 300, § 14, 1923 Minn. Laws 398, 409 (current version at MINN. STAT. § 176.011(16) (1978)).

95. MINN. STAT. § 176.011(16) (1978).

96. See notes 101-28 *infra* and accompanying text.

97. See notes 129-33 *infra* and accompanying text.

98. See notes 134-36 *infra* and accompanying text.

curred while the employee was "being so transported."<sup>99</sup> Each of these requirements will be individually examined.<sup>100</sup>

a. "Regularly Furnished"

The first case to examine the "regularly furnished" requirement was *Gehrke v. Weiss*.<sup>101</sup> In *Gehrke* a construction worker's dependents brought suit under the wrongful death statute after the employee was killed while being transported from a work site to a construction camp at the end of a work day.<sup>102</sup> Interestingly, the employer's defense was that the employee's dependents' sole remedy was under the workers' compensation act, because the death was compensable under section 176.011, subdivision 16.<sup>103</sup> The Minnesota Supreme Court agreed with the employer in holding that, although the statute applied only when the transportation is "regularly furnished," the requirement "does not require a formal contract between employer and employe, nor does it require that the transportation occur 'during the hours of service.'"<sup>104</sup>

The next case to examine the "regularly furnished" concept was *Hardware Mutual Casualty Co. v. Ozmun*.<sup>105</sup> In *Ozmun*, as in *Gehrke*, the employee sought to recover in tort for a personal injury sustained while riding home in the employer's vehicle.<sup>106</sup> The employer argued that the employee's sole remedy was under the workers' compensation law.<sup>107</sup> Occasionally, the employer drove the employee within two blocks of her home after work.<sup>108</sup> On the date of the injury, because of inclement weather, the employer decided to drive the employee to a point less than one block from her

99. See notes 137-40 *infra* and accompanying text.

100. See notes 101-40 *infra* and accompanying text.

101. 204 Minn. 445, 284 N.W. 434 (1939).

102. See *id.* at 445-47, 284 N.W. at 434-35.

103. See *id.* at 447, 284 N.W. at 435. Precisely what effect the employee's desire to bring a common-law action may have had on the court's construction of the phrase "regularly furnished" is uncertain. Professor Larson with keen insight has observed:

When the person relying upon the employment relation is not an employee seeking compensation, but an employer seeking a defense to a common-law suit, it should not be thought surprising if a court is somewhat more exacting in the evidence it will accept to establish an employment agreement by implication.

1C A. LARSON, *supra* note 1, § 47.42(a) (1980).

104. 204 Minn. at 448, 284 N.W. at 436.

105. 217 Minn. 280, 14 N.W.2d 351 (1944).

106. See *id.* at 282, 14 N.W.2d at 353.

107. See *id.*

108. See *id.* at 281-82, 14 N.W.2d at 352-53.

home.<sup>109</sup> This necessitated crossing railroad tracks where the accident occurred.<sup>110</sup>

In reaching its decision, the *Ozmun* court construed the phrase "regularly furnished" as follows:

[T]he word *furnishes* implies that the employer by affirmative act provides or makes available to his employes regular transportation to and from their work as an incident of the employment. Mere permissive riding on the employer's vehicles not affirmatively provided as such transportation is not sufficient. The word *regularly* connotes that an occurrence is according to an established and arranged plan or rule and not to unexplained or irrational variation.<sup>111</sup>

Based on this construction, the *Ozmun* court held that the employee could sue her employer in a common-law tort action because transportation was never furnished the employee.<sup>112</sup> Rather, the employee was merely permitted to ride in the automobile as a "courtesy."<sup>113</sup>

The *Ozmun* court's questionable requirement that the furnishing of transportation must be made pursuant to "an incident of the employment" was blown out of proportion in a 1972 decision. Under the rule enunciated in *Bonfig v. Megarry Bros.*,<sup>114</sup> the employer must regularly furnish transportation to an employee, and the "furnishing" must be "made pursuant to an understanding or agreement, expressed or implied, that 'being so transported' was a condition of the employment relationship" before liability arises.<sup>115</sup> While the former requirement finds support in the statute,<sup>116</sup> the latter clearly does not.<sup>117</sup> Section 176.011, subdivision 16 contains no requirement that the transportation must be furnished pursuant to an understanding that the transportation be furnished as a condition of the employment relationship.<sup>118</sup> Consequently, the *Bonfig* rule should be modified by abrogating its sec-

109. *See id.* at 282, 14 N.W.2d at 353.

110. *See id.*

111. *Id.* at 285, 14 N.W.2d at 354 (emphasis in original).

112. *See id.* at 286-88, 14 N.W.2d at 355-56.

113. *Id.* at 286, 14 N.W.2d at 355.

114. 294 Minn. 180, 199 N.W.2d 796 (1972).

115. *Id.* at 182, 199 N.W.2d at 798.

116. MINN. STAT. § 176.011(16) (1978) provides in relevant part: "[W]here the employer regularly furnished transportation to his employees to and from the place of employment such employees are subject to this chapter while being so transported."

117. *See id.*

118. *See id.*

ond requirement for compensation. This result would be consistent with the rulings in a number of jurisdictions that have questioned the correctness of requiring employees to prove that transportation was furnished pursuant to an understanding that the furnishing of transportation was a condition of the employment relationship.<sup>119</sup> Professor Larson also has questioned this requirement on the basis that the reason for allowing compensation in employer-furnished transportation situations is the increased risk of employment that falls within the ambit of the employer's control.<sup>120</sup>

Fortunately, a 1977 Minnesota case can be interpreted as laying to rest the second part of the *Bonfig* rule. In *Lehn v. Kladt*,<sup>121</sup> the court upheld an award of compensation to an employee injured while riding home with the employer.<sup>122</sup> The employer had been driving the employee to and from work for almost two months because, "if I bring the son of a bitch to work I'll know he's here everyday."<sup>123</sup>

Two reasons exist for viewing *Lehn* as abrogating *Bonfig's* second requirement. First, the *Lehn* court emphasized that the employee sustained his burden of proof merely by testifying that the furnishing of transportation benefited the employer.<sup>124</sup> Second, the compensation court's<sup>125</sup> decision in *Lehn* indicated compensation was proper because the employee proved the transportation was pro-

119. *See, e.g.*, *City of San Francisco v. Industrial Accident Comm'n*, 61 Cal. App. 2d 248, 142 P.2d 760 (1943); *Micieli v. Erie R.R.*, 131 N.J.L. 427, 37 A.2d 123 (1944); *Glaser v. Ideal Guar. Roofing Co.*, 221 A.D. 434, 223 N.Y.S. 237 (1927).

120. *See* 1 A. LARSON, *supra* note 1, § 17.40, at 4-204 to -207.

121. 312 Minn. 557, 250 N.W.2d 846 (1977) (per curiam).

122. *See id.* at 557-58, 250 N.W.2d at 847.

123. *Id.* at 559, 250 N.W.2d at 848.

124. *See id.* at 558, 250 N.W.2d at 848. It should be noted, however, that the *Lehn* court commented in a footnote: "coverage has been denied upon a finding that the employee was transported merely for his own convenience, as a permissive use and not as a matter of right under the employment contract." *Id.* at 558 n.2, 250 N.W.2d at 848 n.2 (citing *Bonfig*). The effect of this language is, at best, uncertain.

125. "Compensation court" is used throughout this Article to refer to the entity designated "Industrial Commission" from 1921 to 1967, "Workmen's Compensation Commission" from 1967 to 1975, "Workers' Compensation Board" from 1975 to 1976, and "Workers' Compensation Court of Appeals" from 1976 to the present. *See* Act of Mar. 15, 1921, ch. 82, § 66(k)(1), 1921 Minn. Laws 90, 126 (Industrial Commission), *as amended by* Act of May 27, 1967, ch. 1, § 7, 1967 Minn. Laws Ex. Sess. 1991, 1993 (Workmen's Compensation Commission), *as amended by* Act of June 2, 1975, ch. 271, § 3(47), 1975 Minn. Laws 742, 746 (Workmen's Compensation Board), *as amended by* Act of June 4, 1975, ch. 359, § 23, 1975 Minn. Laws 1168, 1189 (Workmen's changed to Workers'), *as amended by* Act of Apr. 3, 1976, ch. 134, § 78, 1976 Minn. Laws 316, 345 (Workmen's Compensation

vided pursuant to an understanding or agreement that it was given as a condition of the employment.<sup>126</sup> In affirming the compensation court's decision, the Minnesota Supreme Court did not indicate that the employee had to prove that there was an understanding or agreement that the transportation was furnished as a condition of the employment relationship.<sup>127</sup> Consequently, the present rule in Minnesota appears to be that injuries sustained while traveling to or from work in an employer-provided vehicle are compensable if such transportation is regularly furnished and under the employer's control.<sup>128</sup>

b. "Transportation"

In addition to construing the phrase "regularly furnished"<sup>129</sup> the court in *Bonfig v. Megarry Bros.*<sup>130</sup> also examined the term "transportation." In *Bonfig* the employer, a highway construction contractor, provided its employee, a supervising foreman, with a truck for use in performance of his duties and for his personal use in his off-hours.<sup>131</sup> The employee died in a motor vehicle accident while driving the company truck back to his motel after attending a social dinner for off-duty employees sponsored by the employer.<sup>132</sup> The supreme court affirmed the compensation court's decision that the death did not arise out of and in the course of employment, in part because the employee simply was not involved in an accident while riding in employer furnished "transportation." The supreme court indicated that when an employee uses the employer's motor vehicle for his own convenience, and not for a special errand on behalf of the employer, compensation is improper.<sup>133</sup>

The *Bonfig* construction of the term "transportation" is correct because merely permitting employees to use company vehicles

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Court of Appeals) (current version at MINN. STAT. § 176.011, subd. 6(1) (1978) (Workers' Compensation Court of Appeals)).

126. See 312 Minn. at 558, 250 N.W.2d at 847.

127. Although proof of an understanding or agreement may not be required, the burden is on the employee to prove that "transportation was regularly furnished as a condition of employment." *Id.* at 559 n.3, 250 N.W.2d at 848 n.3.

128. See *id.* at 558-59, 250 N.W.2d at 848.

129. See notes 114-18 *supra* and accompanying text.

130. 294 Minn. 180, 199 N.W.2d 796 (1972).

131. 294 Minn. at 181, 199 N.W.2d at 798.

132. *Id.* at 181-82, 199 N.W.2d at 798.

133. *Id.* at 183-87, 199 N.W.2d at 799-801 (distinguishing cases involving traveling employees such as salesmen).

does not provide a sufficient nexus between an injury and the performance of service for the employer. Moreover, there is obvious inequity in extending coverage to those employees fortunate enough to be given employer vehicles, while those employees who have to rely on their own vehicles or public transportation when traveling to their employment remain unprotected.

c. *"To and from the Place of Employment"*

No Minnesota cases appear to have hinged on the court's treatment of the phrase "to and from the place of employment." The only case in which this phrase may have been given any treatment is *Hardware Mutual Casualty Co. v. Ozmun*.<sup>134</sup> The decision in *Ozmun*, however, rested in large part on the court's definition of the phrase "regularly furnished."<sup>135</sup> Consequently, it is difficult to determine what importance, if any, the employer's transportation of the employee from the employment location to a distance approximately one block from her home may have had. Because the *Ozmun* court determined that the employee had not sustained an injury compensable under section 176.011, subdivision 16,<sup>136</sup> it could be argued that unless the transportation was provided from the employer's facilities directly to the employee's residence, compensation is improper. Certainly, the increased risk of injury to which the employee is subject is not lessened by the employer's decision to provide transportation only part of the way to the employee's residence. Therefore, the mere fact that the employer does not provide transportation all the way "to and from the place of employment" should not prevent compensation in appropriate situations.

d. *"While Being So Transported"*

Not surprisingly, compensation in many cases will turn on how the phrase "while being so transported" is construed. The most important Minnesota case interpreting the quoted phrase is *Markoff v. Emeralite Surfacing Products Co.*<sup>137</sup> In *Markoff* the employee regularly received a ride home from his employer. After alighting from

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134. 217 Minn. 280, 14 N.W.2d 351 (1944).

135. See notes 105-13 *supra* and accompanying text.

136. See 217 Minn. at 283-86, 14 N.W.2d at 354-55. The *Ozmun* court also considered the infrequency of the rides and the fact that the employee was the sister of the employer. See *id.* at 285-86, 14 N.W.2d at 354.

137. 190 Minn. 555, 252 N.W. 439 (1934).

the employer's truck and taking two or three steps across the highway the employee was struck and seriously injured by an automobile. In upholding an award of compensation, the court, quoting from an early Virginia case, that stated "the transportation of this claimant to his home was not completed until he had reached a point which exempted him from the risks incident to that particular journey."<sup>138</sup> Although Justice Stone wrote a stinging dissent,<sup>139</sup> the *Markoff* interpretation of the phrase "while being so transported" is logically consistent with the theoretical underpinnings of our workers' compensation system.<sup>140</sup> Therefore, the *Markoff* rule, although nearly four decades old, continues to have its original validity and should be followed in appropriate situations.

## 2. *Travel as a Part of Service*

### a. *The General Rule*

When the employee receives a substantial payment or reimbursement for travel expenses,<sup>141</sup> or payment for the time spent traveling,<sup>142</sup> the entire journey normally will be in the course of

138. *Id.* at 559, 252 N.W. at 441 (quoting *Scott v. Willis*, 150 Va. 260, 265, 142 S.E. 400, 401 (1928)).

139. *Id.* at 561-62, 252 N.W. at 441-42 (Stone, J., dissenting).

140. *See* note 65 *supra* and accompanying text.

141. *See, e.g.*, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947) (employee was member of a car pool that employer subsidized); *Van De Walle v. American Cyanamid Co.*, 477 F.2d 20 (5th Cir.), *cert. denied*, 414 U.S. 1067 (1973) (employer paid travel allowance for employees' unscheduled emergency trips to plant); *Bell v. General Am. Transp. Corp.*, 52 Ala. App. 118, 290 So. 2d 184 (1973) (employer agreed to pay employee's mileage costs); *Zenith Nat'l Ins. Co. v. Workmen's Compensation App. Bd.*, 66 Cal. 2d 944, 428 P.2d 606, 59 Cal. Rptr. 622 (1967) (additional \$10 per day wages paid as an inducement to work at job site 130 miles from employee's home); *Swartz v. Food Fair Stores, Inc.*, 175 So. 2d 36 (Fla. 1965) (employee agreed to transfer to another company store only if employer paid transportation costs); *Marshall v. Tribune-Star Publishing Co.*, 251 Ind. 557, 243 N.E. 761 (1969) (employee, required to drive own car, was paid \$5 expense allowance every two weeks); *Western Elec. Co. v. Engleman*, 13 Md. App. 374, 283 A.2d 437 (1971) (travel allowance paid pursuant to union contract); *Lundgaard v. State*, 306 Minn. 421, 237 N.W.2d 617 (1975) (employee paid 10 cents per mile for travel expenses); *Reading & Bates, Inc. v. Whittington*, 208 So. 2d 437 (Miss. 1968) (employee paid \$2 per day for travel expenses); *Ellingson v. Crick Co.*, 166 Mont. 431, 533 P.2d 1100 (1975) (employee paid \$5 per day travel allowance); *Filson v. Bell Tel. Laboratories, Inc.*, 82 N.J. Super. 185, 197 A.2d 196 (App. Div. 1964) (employee reimbursed for travel at 8 1/2 cents per mile); 1 A. LARSON, *supra* note 1, § 16.30. *But see* *Funk v. A.F. Scheppmann & Son Constr. Co.*, 294 Minn. 483, 199 N.W.2d 791 (1972) (compensation denied to employee furnished with pickup truck, together with payment for its operation); *Norvill v. Paul Hardeman, Inc.*, 377 P.2d 208 (Okla. 1962) (employee paid \$2 per day travel allowance to work at remote missile site denied compensation).

142. *See, e.g.*, *Serrano v. Industrial Comm'n*, 75 Ariz. 326, 256 P.2d 709 (1953) (claim-

employment. Professor Larson indicates that this rule is justifiable because "employment should be deemed to include travel when the travel itself is a substantial part of the service performed."<sup>143</sup>

Two recent Minnesota cases apparently follow the general rule. In 1975 the court decided *Lundgaard v. State*.<sup>144</sup> In *Lundgaard* the claimant was employed to give lectures on emergency health care.<sup>145</sup> On the day of the injury, she drove from Minneapolis to Bemidji, a distance of approximately three hundred miles, to participate in a seminar.<sup>146</sup> The employee received twenty dollars an hour and ten cents per mile for compensation.<sup>147</sup> On her journey back to Minneapolis, the employee was injured in an automobile collision.<sup>148</sup> In reversing the compensation court's denial of compensation, Justice Scott succinctly commented, "The ride home was as much a part of the errand as the ride to Bemidji."<sup>149</sup>

Three years earlier, in *Funk v. A.F. Scheppmann & Son Construction*

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ant received an additional one hour's pay each day for travel and subsistence expense); *Martin K. Eby Constr. Co. v. Industrial Comm'n*, 151 Colo. 320, 377 P.2d 745 (1963) (employee received one hour's travel time per day to drive to remote missile site); *Whaley v. Steuben County Rural Elec. Membership Corp.*, 139 Ind. App. 520, 221 N.E.2d 435 (1966) (employee paid \$15 during time available for emergency calls and if called, received hourly rate from time of emergency call until time he returned home); *Reading & Bates, Inc. v. Whittington*, 208 So. 2d 437 (Miss. 1968) (compensation proper when employee received travel pay at time of injury); 1 A. LARSON, *supra* note 1, § 16.20.

143. 1 A. LARSON, *supra* note 1, § 16.30, at 160. Professor Larson also notes that if the distance is not great, compensation may still be appropriate if special circumstances surround the injury. *See id.* at 172. For example, in *Katz v. Katz*, 137 Conn. 134, 75 A.2d 57 (1950), the employer promised to provide transportation for an employee with a weak heart as an inducement to persuade the employee to remain with the company after it moved across town. Subsequently, on a day when no transportation was available, the employee was struck by a car on his way to catch a bus. The court affirmed an award of compensation because the employer failed to provide the agreed upon transportation and had directed the employee to take a bus. In obeying the employer's instructions, the employee was acting within the course of his employment. *See id.* at 139, 75 A.2d at 59-60. *See also* *Ellingson v. Crick Co.*, 166 Mont. 431, 533 P.2d 1100 (1975); *McMillen v. Arthur G. McKee & Co.*, 166 Mont. 400, 533 P.2d 1095 (1975). In both *Ellingson* and *McMillen* the Montana Supreme Court held that although travel payments to the employees were not intended as compensation for time spent traveling, the employment agreements in each case specifically stated that a travel allowance was to be paid. Therefore, the injuries suffered by the employees were compensable. *See* *Ellingson v. Crick Co.*, 166 Mont. at 432-33, 533 P.2d at 1101; *McMillen v. Arthur G. McKee & Co.*, 166 Mont. at 405-06, 533 P.2d at 1098.

144. 306 Minn. 421, 237 N.W.2d 617 (1975).

145. *See id.* at 422, 237 N.W.2d at 618.

146. *See id.*

147. *See id.*

148. *See id.*

149. *Id.* at 424, 237 N.W.2d at 619.

Co.,<sup>150</sup> the court, in a per curiam opinion, reversed an award of compensation to an employee injured in a traffic accident. The employee, working on a construction project in Iowa, was permitted to use his employer's truck to visit his family in Minnesota on weekends.<sup>151</sup> The court indicated that an award of compensation was improper because the trip was made for the employee's "personal convenience."<sup>152</sup> The distinguishing feature between *Lundgaard* and *Funk* is the court's recognition in the latter case that injuries received on personal missions do not fall within the ambit of the travel as a part of service rule even if the employer furnishes the mode of transportation.

### b. *Traveling Employees*

As a general rule, a traveling employee, for example a salesperson, is in the course of employment continuously during a business trip.<sup>153</sup> Logic supports this rule. First, the traveling employee's vehicle may be viewed as a fragment of the employer's premises throughout the trip.<sup>154</sup> Second, even when traveling employees

150. 294 Minn. 483, 199 N.W.2d 791 (1972) (per curiam).

151. *See id.* at 483-84, 199 N.W.2d at 792. Besides furnishing the employee with a pickup truck to perform his job and travel to his home, he was given expense money for the pickup truck's operation. *See id.*

152. *Id.* at 484-85, 199 N.W.2d at 792-93.

153. *See, e.g.*, *Employers' Liab. Assurance Corp. v. Industrial Comm'n*, 147 Colo. 309, 363 P.2d 646 (1961) (overseas employee killed while deviating from travel made pursuant to company orders); *C.A. Dunham Co. v. Industrial Comm'n*, 16 Ill. 2d 102, 156 N.E.2d 560 (1959) (traveling employee killed when bomb exploded in airplane); *Widman v. Murray Corp. of America*, 245 Mich. 332, 222 N.W. 711 (1929) (traveling employee injured on train platform); *Epp v. Midwestern Mach. Co.*, 296 Minn. 231, 208 N.W.2d 87 (1973) (over-the-road truck driver killed while walking to motel); *Snyder v. General Paper Corp.*, 277 Minn. 376, 152 N.W.2d 743 (1967) (traveling salesman choked to death while entertaining customer); *Stansberry v. Monitor Stove Co.*, 150 Minn. 1, 183 N.W. 977 (1921) (traveling salesman killed in hotel fire); *Lewis v. Lowe & Campbell Athletic Goods Co.*, 247 S.W.2d 800 (Mo. 1952) (traveling salesman killed in auto accident near his home); *West Tenn. Nix-A-Mite Sys., Inc. v. Funderburk*, 208 Tenn. 381, 346 S.W.2d 250 (1961) (truck driver killed in collision when he returned to his route after stop at dance hall).

In *Snyder*, the court affirmed an award of compensation for an employee's fatal injury while eating at a restaurant while on a trip with a prospective customer. In so holding, the court stated:

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, *except when a distinct departure on a personal errand is shown*. Thus, injuries arising out of the necessity of sleeping in hotels, or eating in restaurants away from home are usually held compensable.

277 Minn. at 379, 152 N.W.2d at 746 (emphasis by the court) (quoting 1A A. LARSON, *supra* note 1, § 25.00 (1979)).

154. Professor Larson indicates that "[the employer] has, in a sense, sent the employee

are not driving vehicles they may be viewed as carrying on their employer's business until the return trip has been completed.<sup>155</sup> Thus, when a traveling employee is struck by an automobile while traveling between his hotel and a restaurant,<sup>156</sup> slips in a hotel bathtub,<sup>157</sup> or suffers injury as a result of a fire in a hotel,<sup>158</sup> an award of compensation is proper.

As with most general rules, the exceptions make its application difficult.<sup>159</sup> If the employee is on a distinct departure or on a personal mission when injured, the in the course of requirement will not be satisfied.<sup>160</sup> Thus, if a traveling salesman decides to spend his time visiting a female companion while waiting for a train and dies in a car accident while journeying to his companion's apart-

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home on a small ambulatory portion of the premises, just as the sailor on a British ship is conceived to be on a little floating fragment of Britain herself." 1 A. LARSON, *supra* note 1, § 17.10, at 180.

155. See generally *id.* § 17.00.

156. See, e.g., *Crees v. Sheldahl Tel. Co.*, 258 Iowa 292, 139 N.W.2d 190 (1965); *Epp v. Midwestern Mach. Co.*, 296 Minn. 231, 208 N.W.2d 87 (1973); *Robinson v. Federal Tel. & Radio Corp.*, 44 N.J. Super. 294, 130 A.2d 386 (1957); *Robards v. New York Div. Elec. Prods., Inc.*, 33 A.D.2d 1067, 307 N.Y.S.2d 599 (1970); *Shelton v. Standard Ins. Co.*, 389 S.W.2d 290 (Tex. 1965).

157. See *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Adler*, 340 F.2d 799 (D.C. Cir. 1964); *Miller v. F.A. Bartlett Tree Expert Co.*, 3 N.Y.2d 654, 48 N.E.2d 296, 171 N.Y.S.2d 77 (1958). But see *Paduano v. New York State Workmen's Compensation Bd.*, 30 A.D.2d 1009, 294 N.Y.S.2d 318 (1968), *aff'd*, 25 N.Y.2d 669, 254 N.E.2d 776, 306 N.Y.S.2d 476 (1969) (compensation denied on ground that employee's bathtub fall was a personal act).

158. See, e.g., *California Cas. Indem. Exch. v. Industrial Accident Comm'n*, 5 Cal. 2d 185, 53 P.2d 758 (1936); *Brown v. Palmer Constr. Co.*, 295 A.2d 263 (Me. 1972); *Stranberry v. Monitor Stove Co.*, 150 Minn. 1, 183 N.W. 977 (1921); *Burton v. Broadcast Music, Inc.*, 31 A.D.2d 557, 294 N.Y.S.2d 406 (1968), *aff'd*, 24 N.Y.2d 1016, 250 N.E.2d 243, 302 N.Y.S.2d 839 (1969); 1A A. LARSON, *supra* note 1, § 25.10 (1979).

159. See *Gumbrill v. General Motors Corp.*, 216 Minn. 351, 13 N.W.2d 16 (1944); *Lunde v. Congoleum-Nairn, Inc.*, 211 Minn. 487, 1 N.W.2d 606 (1942).

In *Gumbrill* the court stated:

It is true that . . . a traveling employe is considered as carrying on his employer's business at any time he is in his prescribed territory. This cannot be construed, however, as meaning that in all circumstances an employe is covered by the workmen's compensation act from the time a special errand or mission starts until it is completed. As stated in *Lunde v. Congoleum-Nairn* . . . , "Such argument assumes that it is impossible for a traveling man, even though he be otherwise and mostly engaged on his employer's business, to so depart therefrom on an enterprise of his own as to put him for the time being beyond coverage of the law. Obviously he may do so."

216 Minn. at 352-53, 13 N.W.2d at 17-18. The *Lunde* court stated that the argument that time and place factors are decisive "ignores the real determinant, which is the employee's activity of the moment." See 211 Minn. at 489, 1 N.W.2d at 607.

160. See note 159 *supra*.

ment, his widow is not entitled to compensation benefits.<sup>161</sup> Similarly, if a traveling employee is seriously injured while driving several miles out of his way to view the wreckage of an aircraft, compensation will be denied.<sup>162</sup>

Determining when a traveling employee's activity is reasonable, or when such an employee is on a distinct departure or on a personal mission, presents a challenge to the fact-finder. The only guidance offered by the Minnesota court may be gleaned from a 1973 decision. In *Epp v. Midwestern Machinery Co.*,<sup>163</sup> the court apparently indicated that if an employer could foresee the hazard causing the traveling employee's injury, then such an injury arises out of and in the course of employment.<sup>164</sup> Although the foresee-

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161. See *Lunde v. Congoleum-Nairn, Inc.*, 211 Minn. 487, 1 N.W.2d 606 (1942). Here, claimant, the widow of a traveling salesman killed in an automobile accident, sought workers' compensation benefits. *Id.* at 487-88, 1 N.W.2d at 606. On the fatal day, decedent was in Minneapolis attending a sales conference. *Id.* Having completed his employment functions, decedent was to return by train to Fargo, leaving Minneapolis at 11 p.m. *Id.* The intervening hours before the train left were to be spent with a friend and two women. On their way to pick up the women, the fatal automobile accident occurred. *Id.* at 488, 1 N.W.2d at 606-07. In denying compensation the court stated:

For relator, it is insisted, with misplaced confidence, that as [a] matter of law compensation should be granted under the rule of the "traveling men's cases." e.g., *Howlett v. Midwest Distributors, Inc.* . . . . Precisely, the argument is that "so long as Lunde did the natural and customary thing which any salesman would do who had a roving commission such as his, and had four hours' time to kill waiting for a train, he was covered by the [compensation] Act."

Such argument assumes that it is impossible for a traveling man, even though he be otherwise and mostly engaged on his employer's business, to so depart therefrom on an enterprise of his own as to put him for the time being beyond coverage of the law. Obviously he may do so. Upon abundant evidence, the triers of fact have found that Mr. Lunde did just that.

. . . . .  
Basically, the argument for relator is wrong in its seeming assumption that factors of time and place are decisive. It ignores the real determinant, which is the employe's activity of the moment. Mr. Lunde's activity of the moment was wholly his own and, as found below, beyond the scope of his employment. That a traveling salesman is within his own "territory" does not bring all his actions away from home within the compensation act. The risks of diversions on errands and for reasons personal to him are not all occupational as [a] matter of law. There is no suggestion that either of the ladies was a prospective buyer of insurance or linoleum. It would strain both credulity and generosity to hold that the fatal mishap arose out of and in the course of the employment of either Lunde or Foster. Too reasonable is the conclusion that course of employment of both was left for the time being for a detour leading to pleasure rather than business effort.  
*Id.* at 488-90, 1 N.W.2d at 607 (brackets in original).

162. See *Laerd v. Pillsbury Mills, Inc.*, 17 Minn. Workmen's Comp. Dec. 46 (1951); *cf.* *Rhea v. Overholt*, 222 Minn. 467, 25 N.W.2d 656 (1946) (traveling salesman injured while stopped at tavern to answer a "call of nature" not entitled to compensation benefits).

163. 296 Minn. 231, 208 N.W.2d 87 (1973).

164. In *Epp* an over-the-road truck driver, required to lay over because his return ship-

ability test may provide courts with a broad tool with which to mold their opinions, it sacrifices certainty and does violence to prior interpretations of section 176.011, subdivision 16.<sup>165</sup> Moreover, the foreseeability test is inappropriate in a "no-fault" compensation system and fosters litigation because of the necessity of a hind-sight application. A more appropriate test would be to consider whether the employment is the predominant factor in exposing an employee to a hazard that is peculiar to the employment in a different manner and to a greater degree than if he had been pursuing his personal affairs. This test, although apparently inconsistent with *Epp*,<sup>166</sup> finds support in prior Minnesota law<sup>167</sup> and, more importantly, preserves the integrity of section 176.011, subdivision 16.

### c. *Travel Between Work Places*

Perhaps the most well-established exception to the coming and going rule is the rule that an injury arises out of and in the course of employment if it occurs while an employee journeys along a public road between two portions of the employer's premises.<sup>168</sup>

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ment was not ready, was killed at 2:30 a.m. walking back from a tavern to his motel. In upholding an award of compensation the court stated:

The commission surmised that employee "to pass some time—during a considerably long waiting period—crossed the road to the tavern and had some drinks until closing time." The record, therefore, is sufficient to support the conclusion that the *employer contemplated*, because of the work schedule of the employee, that he would be exposed to the hazards of being upon a highway at any hour of the day or night, either driving his truck or having to cross it for meals, refreshments, or to return to his motel room. Accordingly, we cannot say that the employee's activity was unreasonable and that the risk to which he was exposed did not directly flow as a natural incident of his employment under the circumstances of this case.

*Id.* at 234-35, 208 N.W.2d at 89 (emphasis added).

165. In several traveling salesperson cases prior to *Epp*, the employee's injury was probably foreseeable; nevertheless, compensation was denied. See *Rhea v. Overholt*, 222 Minn. 467, 25 N.W.2d 656 (1946) (traveling salesman injured while stopped at tavern to answer a "call of nature"); *Gumbrill v. General Motors Corp.*, 216 Minn. 351, 13 N.W.2d 16 (1944) (traveling salesman injured while alighting from car outside restaurant); *Lunde v. Congoleum-Nairn, Inc.*, 211 Minn. 487, 1 N.W.2d 606 (1942) (traveling salesman waiting for train after business meeting killed while on personal errand).

166. See 296 Minn. at 234, 208 N.W.2d at 89.

167. Several prior Minnesota cases support the use of such a test. See, e.g., *Lickfett v. Jorgenson*, 179 Minn. 321, 323, 229 N.W. 138, 138 (1930); *State ex rel. Peoples Coal & Ice Co. v. District Court*, 129 Minn. 502, 503-04, 153 N.W. 119, 120 (1915).

168. 1 A. LARSON, *supra* note 1, § 15.14; 8 W. SCHNEIDER, *supra* note 1, § 1737; see, e.g., *Raytheon Co. v. McLellan*, 304 F. Supp. 433 (D. Mass. 1969); *Lockheed Aircraft Corp. v. Industrial Accident Comm'n*, 28 Cal. 2d 756, 172 P.2d 1 (1946); *Kuharski v. Bristol Brass Corp.*, 132 Conn. 563, 46 A.2d 11 (1946); *Kaycee Coal Co. v. Short*, 450 S.W.2d 262 (Ky. 1970); *State Ins. Fund v. Industrial Comm'n*, 15 Utah 2d 363, 393 P.2d 397 (1964).

Moreover, the mere fact that an employee travels across a route that has been forbidden will not automatically preclude an award of compensation,<sup>169</sup> nor will the use of a longer or less convenient route than necessary prevent compensation if a distinct departure from employment has not occurred.<sup>170</sup>

The "travel between work place" rule has, however, resulted in some conflict between authorities in situations involving travel between parking lots and the employment premises.<sup>171</sup> Apparently, if the parking lot is owned or maintained by the employer most courts will grant compensation for injuries suffered while traveling between the employment premises and parking lot.<sup>172</sup> Conversely, if the parking lot is not owned by the employer, most courts will deny compensation for injuries received while traveling to or from the employment premises.<sup>173</sup>

The Minnesota rule in this area is unclear. The leading Minnesota case discussing the parking lot question is *Goff v. Farmers Union Accounting Service, Inc.*<sup>174</sup> In *Goff* the employee was killed while proceeding directly across the street—not at a crosswalk—to a parking lot made available to employees through an "understanding" between the owner of the parking lot—also owner of the building in

169. See *Herbst v. Hat Corp. of America*, 130 Conn. 1, 31 A.2d 329 (1943); 8 W. SCHNEIDER, *supra* note 1, § 1737, at 181. For a general discussion of the consequences of employee misconduct, see notes 498-558 *infra* and accompanying text.

170. See *Mitchell v. Mitchell Drilling Co.*, 154 Kan. 117, 114 P.2d 841, 844 (1941); *Dennis v. Sinclair Lumber & Fuel Co.*, 242 Mich. 89, 91-92, 218 N.W. 781, 782 (1928); *Meyer v. Royalton Oil Co.*, 167 Minn. 515, 208 N.W. 645, 645 (1926); 8 W. SCHNEIDER, *supra* note 1, § 1737, at 181. For a general discussion of the consequences of employee deviation, see notes 283-308 *infra* and accompanying text.

171. See 1 A. LARSON, *supra* note 1, § 15.14, at 36-40. Compare *Lewis v. Worker's Compensation Appeals Bd.*, 15 Cal. 3d 559, 542 P.2d 225, 125 Cal. Rptr. 353 (1975) (compensation granted to employee injured while proceeding along public streets from employer's parking lot to office) with *Osborn v. Industrial Comm'n*, 50 Ill. 2d 150, 277 N.E.2d 833 (1971) (compensation denied to employee injured while crossing public street that separated factory and employer-owned parking lot).

172. See, e.g., *Lewis v. Worker's Compensation Appeals Bd.*, 15 Cal. 3d 599, 542 P.2d 225, 125 Cal. Rptr. 353 (1975); *Campbell v. Gates Rubber Co.*, 526 P.2d 679 (1974); *Proctor-Silex Corp. v. DeBrick*, 253 Md. 477, 252 A.2d 800 (1969); *Lewis v. Walter Scott & Co.*, 50 N.J. Super. 283, 141 A.2d 807 (1958); *Willis v. State Accident Ins. Fund*, 3 Or. App. 565, 475 P.2d 986 (1970); 1 A. LARSON, *supra* note 1, § 15.14, at 36.

173. See *Dinsmore's Case*, 143 Me. 344, 62 A.2d 205 (1948); *Taylor v. Albain Shirt Co.*, 28 N.C. App. 61, 220 S.E.2d 144 (1975), *cert. denied*, 289 N.C. 302, 222 S.E.2d 703 (1976); 1 A. LARSON, *supra* note 1, § 15.14, at 36-40; *cf. Goff v. Farmers Union Accounting Serv., Inc.*, 308 Minn. 440, 241 N.W.2d 315 (1976) (employees allowed to use parking lot owned by employer's landlord) (per curiam).

174. 308 Minn. 440, 241 N.W.2d 315 (1976) (per curiam).

which the employer leased its office—and the employer.<sup>175</sup> In affirming an award of compensation, the court stated: “In view of the relative proximity of the parking lot to the . . . building, as well as this habitual use by the employees, we conclude that the board’s determination that this route constituted a ‘special hazard’ of decedent’s employment and an injury resulting therefrom is compensable must be affirmed.”<sup>176</sup>

Because of the above-quoted language, one could theorize that liability was assessed for either of two reasons.<sup>177</sup> The court may have adopted the rule that any parking lot used by employees with employer consent may be considered an extension of the employer’s premises. If so, all injuries sustained by an employee when traveling between such a “premises” and the employer’s plant would apparently be compensable. On the other hand, the court’s reference to the special hazard encountered by the employee in crossing the street may have been the reason for assessing liability. Although the mere crossing of a public street could hardly be considered a “special hazard,”<sup>178</sup> predicating liability upon that theory, instead of the parking lot rule, would result in better policy because the parking lot in *Goff* was neither owned nor maintained by the employer.

#### *d. Special Errand Rule*

When an employee is injured while going to or returning from

175. *See id.* at 440-41, 241 N.W.2d at 316-17.

176. *Id.* at 443, 241 N.W.2d at 318.

177. Interestingly, the employee’s attorney in *Goff* argued on appeal:

Thus, there are two theories upon which respondent may prevail in this matter.

First, by adoption of the rule . . . that a parking lot maintained by an employer for use of his employees is considered a premises, and that the general rule is an employee injured while traveling between two premises of his employer is injured in an activity arising out of and in the course of his employment.

The instant case also fits within the special hazard doctrine which has been accepted in Minnesota . . . .

Respondent’s Brief at 12, *Goff v. Farmers Union Accounting Serv., Inc.*, 308 Minn. 440, 241 N.W.2d 315 (1976).

178. In *Blanks v. Oak Ridge Nursing Home*, 281 N.W.2d 690 (Minn. 1979), the court recognized that crossing an ordinary public street was not a “special hazard” by noting that:

[T]he hazard to which relator was exposed was not one incident or causally related to her employment but instead one no greater than that to which all others not so employed would be exposed if they chose to traverse the boulevard. Her claim that the frontage road was in effect on employees’ parking lot, bringing the case within the rule of *Goff*. . . . is not persuasive . . . .

*Id.* at 690.

emergency work or a special mission performed on behalf of the employer, the "coming and going" rule is not applicable.<sup>179</sup> In Minnesota the special-errand doctrine was first recognized in the 1935 decision of *Nehring v. Minnesota Mining & Manufacturing Co.*<sup>180</sup> In *Nehring* the employee, an electrician, was requested by his employer to report to work on Sunday to replace a fuse.<sup>181</sup> While en route home on a motorcycle, the employee was killed in a collision with an automobile.<sup>182</sup> In affirming an award of compensation, the *Nehring* court held that an off-duty employee called to do an errand or perform a special mission is deemed to be within the scope of employment from the moment he leaves his home until his return after completion of the mission.<sup>183</sup>

Although subsequent Minnesota decisions have followed this doctrine,<sup>184</sup> the Minnesota court did not outline the requirements for its application until 1963. In *Youngberg v. Donlin Co.*,<sup>185</sup> the court indicated that a three-prong test had to be met before an employee's injury fell within the ambit of the special-errand doctrine.<sup>186</sup> First, the employer must make an express or implied re-

179. See, e.g., *Frank Lyon Co. v. Oates*, 225 Ark. 682, 284 S.W.2d 637 (1955); *Jonas v. Lillyblad*, 272 Minn. 299, 137 N.W.2d 370 (1965); *Flanders v. Hoy*, 230 Pa. Super. Ct. 322, 326 A.2d 492 (1974); 1 A. LARSON, *supra* note 1, § 16.10. See generally *Patterson v. Whitten*, 57 Ala. App. 297, 328 So. 2d 301 (1976).

180. 193 Minn. 169, 258 N.W. 307 (1935).

181. See *id.* at 170, 258 N.W. at 307.

182. See *id.* at 170, 258 N.W. at 307-08.

183. The *Nehring* court, quoting from an earlier United States Supreme Court decision, stated:

While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employe leaves his home on the duty assigned to him and shall continue until his return. . . . In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the compensation act.

*Id.* at 173-74, 258 N.W.2d at 309 (quoting *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162, 169-70 (1933)).

184. See *Cosgriff v. Duluth Firemen's Relief Ass'n*, 233 Minn. 233, 46 N.W.2d 250 (1951) (employee instructed to attend out-of-town meeting awarded compensation for injuries and disability sustained); *Oestreich v. Lakeside Cemetery Ass'n*, 229 Minn. 209, 38 N.W.2d 193 (1949) (compensation awarded when employee sustained injuries resulting in death while deviating from special errand for personal business).

185. 264 Minn. 421, 119 N.W.2d 746 (1963).

186. The *Youngberg* court stated:

From an examination of the authorities which discuss the so-called special errand rule it appears that it has been applied where (a) there is an express or implied request that the service be performed after working hours by an employee who has fixed hours of employment; (b) the trip involved on the errand

quest that the service be performed after working hours by an employee who has fixed hours of employment.<sup>187</sup> Second, the trip must be an integral part of the service performed.<sup>188</sup> Finally, the work performed must be special and not work that is regular and recurring during the normal hours of employment.<sup>189</sup>

The requirement that the trip must be an integral part of the service performed appears to have been abrogated by *Jonas v. Lilyblad*.<sup>190</sup> In *Jonas* an employee had gone back to his employer's hotel after his normal working hours to shut off a stoker. The employee was struck by an automobile while crossing an intersection on the way home. In affirming an award of compensation, the court emphasized that the dominant consideration in special-errand cases is two-fold. First, the service an employee performs must be made after working hours.<sup>191</sup> Second, the service performed can be neither regular nor recurring during the employee's normal hours of employment.<sup>192</sup> *Jonas* should be interpreted as eliminating *Youngberg's* second requirement, the meaning of which was, at best, unclear.

Perhaps the most difficult application of the special-errand doctrine occurs in situations in which the completion of the mission is at issue. For example, in *Bengston v. Greening*,<sup>193</sup> the employee, a bookkeeper, who normally worked a five-day week, was requested to work on Saturday to assist an accountant preparing the employer's income tax report.<sup>194</sup> After the work was completed, the employee's husband drove her home.<sup>195</sup> After getting out of the automobile in front of her home, the employee crossed a public sidewalk and sustained an injury when she slipped and fell.<sup>196</sup> The *Bengston* court, in rejecting the argument that such a mission is complete when the employee arrives home, stated that "[h]er walk

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be an integral part of the service performed; and (c) the work performed, although related to the employment be special in the sense that the task requested was not one which was regular and recurring during the normal hours of employment.

*Id.* at 425, 119 N.W.2d at 749.

187. *Id.*

188. *Id.*

189. *Id.*

190. 272 Minn. 299, 137 N.W.2d 370 (1965).

191. *See id.* at 305, 137 N.W.2d at 374.

192. *See id.*

193. 230 Minn. 139, 41 N.W.2d 185 (1950).

194. *See id.* at 140, 41 N.W.2d at 186.

195. *See id.*

196. *Id.*

from the car to the house was occasioned by the errand."<sup>197</sup> The author suggests that affording employees on special errands the same protection that is afforded traveling salesmen would relieve the dilemma. Absent a deviation, the employee, when responding to a special call of the employer, would be covered from the time he initiates the journey until he has safely returned to his point of departure.

### 3. *Safe Ingress to or Egress from Employment Rule*

Certainly one of the more confusing exceptions to the coming and going rule is the requirement that employers furnish their employees safe ingress to or egress from their employment premises.<sup>198</sup> Much of the confusion can be traced to two factors. First, the safe ingress and egress rule and the special-hazard doctrine are often interwoven in muddled opinions.<sup>199</sup> Second, at least in Minnesota, the premises concept has never clearly been defined.

As a general rule, the employment premises are coterminous with the area devoted by the employer to the industry with which the employee is associated.<sup>200</sup> Thus, if the employee works in a factory the premises will include everything within the factory fence.<sup>201</sup> Parking lots maintained, owned, or leased by the employer also are considered to be part of the premises<sup>202</sup> even when separated from the employer's main premises.<sup>203</sup> Similarly, an employer who rents office space in a building may be liable to employees who sustain injuries in the halls, common stairs, lobbies, elevators, or vestibules in which the employer may be deemed to

197. *Id.*

198. *See* *Simonson v. Knight*, 174 Minn. 491, 219 N.W. 869 (1928).

199. The special hazard doctrine is examined in notes 225-37 *infra* and accompanying text.

200. 1 A. LARSON, *supra* note 1, § 15.41.

201. *Id.* Indeed, it may even include the fence itself. *Id.* § 15.41, at 4-59 n.1; *see* *Nelson Elec. Mfg. Co. v. Shatwell*, 203 Okla. 417, 222 P.2d 750 (1950) (compensation awarded to employee injured while climbing employer's fence as was customary when main gate was locked).

202. *See* *Lewis v. Worker's Compensation Appeals Bd.*, 15 Cal. 3d 559, 542 P.2d 225, 125 Cal. Rptr. 353 (1975); *Campbell v. Gates Rubber Co.*, 526 P.2d 679 (Colo. App. 1974); *Proctor-Silex Corp. v. DeBrick*, 253 Md. 477, 252 A.2d 800 (1969); *Lewis v. Walter Scott & Co.*, 50 N.J. Super. 282, 141 A.2d 807 (1958); *Willis v. State Accident Ins. Fund*, 3 Or. App. 565, 475 P.2d 986 (1970); 1 A. LARSON, *supra* note 1, § 15.14.

203. *See, e.g.*, *Goff v. Farmers Union Accounting Serv. Inc.*, 308 Minn. 440, 241 N.W.2d 315 (1976) (*per curiam*); *Van Deusen v. County of Onondaga*, 45 A.D.2d 794, 357 N.Y.S.2d 155 (1974); *Ingersoll-Rand Co. v. Workmen's Compensation Appeal Bd.*, 12 Pa. Commw. Ct. 502, 316 A.2d 673 (1974).

have an easement.<sup>204</sup>

Illustrative of the safe ingress and egress rule in Minnesota is *Simonson v. Knight*.<sup>205</sup> In *Simonson* a restaurant employee who customarily entered and departed from the back door of the restaurant and traveled across the rear of the lot on which the restaurant was located, fell into an excavation on the lot.<sup>206</sup> In reversing the compensation court's order denying compensation, the court held that the route of ingress and egress was an incident of employment, and as such, was part of the "working premises" on which the hazards encountered were employment related.<sup>207</sup>

Although Professor Horovitz and a few courts have advocated the position that employers should protect employees for a reasonable distance before reaching or after leaving the employer's premises,<sup>208</sup> this is not the rule in Minnesota. Persuasive reasons for not adopting Professor Horovitz's proposal are illustrated by recent cases from New Jersey and Michigan.<sup>209</sup>

In *DiNardo v. Newark Board of Education*,<sup>210</sup> the employee was injured after work when her heel caught in a crack in a public sidewalk adjacent to the school building in which she was employed.<sup>211</sup> At the time of the injury, the employee was on her way to a bus stop.<sup>212</sup> The New Jersey court indicated that compensation was proper for several reasons, emphasizing that the employee was in an area where she might reasonably be and was therefore a reasonable distance away from the employer's premises.<sup>213</sup>

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204. See *In re Harlow's Case*, 345 Mass. 765, 186 N.E.2d 925 (1962) (lobby); *Lammering v. United Benefit Life Ins. Co.*, 464 S.W.2d 511 (Mo. App. 1971) (elevator); *Cerria v. Union News Co.*, 31 N.J. Super. 369, 106 A.2d 745 (1954) (common stairs); *Podhoretz v. Rubinstein*, 35 A.D.2d 1042, 316 N.Y.S.2d 941 (1970) (vestibule); *McGrath v. Chautauqua County Home*, 31 A.D.2d 577, 294 N.Y.S.2d 456 (1968) (hallway).

205. 174 Minn. 491, 219 N.W. 869 (1928).

206. *Id.*

207. *Id.* at 492-93, 219 N.W. at 870-71.

208. See S. HOROVITZ, *supra* note 15, at 161; Horovitz, *supra* note 80, at 49-52.

209. See notes 210-18 *infra* and accompanying text for a discussion of these cases.

210. 118 N.J. Super. 536, 289 A.2d 259 (1972) (per curiam).

211. *Id.*

212. *Id.*

213. The *DiNardo* court commented:

[P]etitioner's accident arose out of the employment since it resulted from a risk reasonably incidental thereto, to-wit: a crack in the sidewalk over which she was required to travel in making her work-connected trip to and from work, and that it arose in the course of her employment since she was then doing what one so employed might reasonably do within the time during which she was employed and at a place where she might reasonably be during that time.

Similarly, in *Fischer v. Lincoln Tool & Die Co.*,<sup>214</sup> the employee, while proceeding to his employer's premises, slipped and fell on some ice on a public sidewalk adjacent to the employer's property.<sup>215</sup> The Michigan court held that compensation was proper because it was reasonable for the employer to expect its employees to park in a public street.<sup>216</sup>

As Professor Larson notes in discussing the *DiNardo* and *Fischer* cases, "there is no stopping the process started by these decisions short of complete demolition of the premises rule."<sup>217</sup> Professor Larson also indicates that the apparent reasonableness test of *DiNardo* and *Fischer* contains nothing to justify differentiating between fifty and 200 feet.<sup>218</sup> Although it is just as "reasonable" to expect that an employee will drive to work, an injury suffered in an auto accident fifty feet from the plant should not be compensable. Neither the reasonableness of the employee's activity nor the ability of the employer to foresee the activity should be the determinative factor.

Fortunately, the Pandora's box containing *DiNardo* and *Fischer* has not been opened by the Minnesota Supreme Court. Indeed, implicit in two recent Minnesota decisions is a rejection of the "reasonableness" test. In *Satack v. State*,<sup>219</sup> the court denied compensation to a state employee who fell on a public sidewalk located on state-owned property approximately ten feet away from the entrance to the building in which she worked.<sup>220</sup> The court denied compensation because the employee had not yet reached the em-

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*Id.*

214. 37 Mich. App. 198, 194 N.W.2d 476 (1972) (per curiam).

215. *Id.* at 199, 194 N.W.2d at 477.

216. *Id.* at 199, 194 N.W.2d at 477-78.

217. 1 A. LARSON, *supra* note 1, § 15.12.

218. *See id.* Professor Larson comments:

Now suppose claimant has parked his car in the public street six blocks from the school. Can walking to this parking space be distinguished from walking to a bus stop? Michigan, in *Fischer*, has already given an answer. Indeed, suppose claimant is not walking to a car or bus at all, but simply walking home. Assuming the distance is no greater than that to the bus stop, how can this claimant be denied compensation merely because he did not happen to need vehicular transportation? Next suppose that the walking distance is a little longer than that to public transportation—is the court going to draw some imaginary line and say that only the first six blocks are covered? If a seven-block case comes up, will the court have the audacity to issue a denial, when only one block [*sic*] separates the two cases?

*Id.*

219. 275 N.W.2d 556 (Minn. 1978).

220. *Id.* at 557.

ployer's premises.<sup>221</sup>

Subsequently, in *Blanks v. Oak Ridge Nursing Home*,<sup>222</sup> the Minnesota Supreme Court affirmed a decision denying compensation to an employee who rode to work with a coemployee who parked on the street in front of the employer's premises. The employee sustained an injury when she fell on a grassy area between the street and sidewalk in front of the employer's premises.<sup>223</sup> The court emphasized that the hazard to which the employee was exposed was not related to her employment and was no greater than the hazard to which all other members of the public would be exposed if they chose to travel the boulevard in front of the employer's premises.<sup>224</sup>

In summary, the two most recent Minnesota Supreme Court decisions indicate that the "safe ingress and egress rule" is limited in its application to injuries occurring on the employer's premises. The court has refrained from carving out exceptions on the basis of such an illogical and ill-defined distinction as reasonable proximity.

#### 4. *Special Hazard Exception*

Many jurisdictions, including Minnesota, have formulated a general rule that when an employee is injured on a roadway that is principally an avenue of ingress to or egress from the employer's premises and the roadway is located in such a manner that hazards encountered on it are peculiar to the employment, injuries suffered because of the "special hazard" will generally be compensable.<sup>225</sup>

The Minnesota rule in this area is unsettled because of the apparent inconsistent results in two supreme court cases. In *Johannsen v. Acton Construction Co.*,<sup>226</sup> an employee, injured during his lunch hour while traveling over a roadway leading from his employer's premises, was allowed compensation because the recognized use of the roadway to and from the employment exposed him to a special

221. *Id.* at 557-58.

222. 281 N.W.2d 690 (Minn. 1979) (per curiam).

223. *Id.*

224. *Id.*

225. See *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 159 (1928); *Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 299, 271 P.2d 1016, 1019 (1954); *Johannsen v. Acton Constr. Co.*, 264 Minn. 540, 550-51, 119 N.W.2d 826, 832 (1963); 1 A. LARSON, *supra* note 1, § 15.13.

226. 264 Minn. 540, 119 N.W.2d 826 (1963).

hazard peculiar to his employment.<sup>227</sup> One year later, however, in *Bronson v. Joyner's Silver & Electroplating, Inc.*,<sup>228</sup> on almost identical facts, compensation was denied.<sup>229</sup> The only apparent factual distinction between *Johannsen* and *Bronson* was that in *Johannsen* the roadway had been barricaded to the public and marked "Private Property. No Thoroughfare."<sup>230</sup> In *Bronson*, on the other hand, the employee and four coemployees were killed when their automobile was struck by a train while they were driving over a roadway used by the general public.<sup>231</sup>

The feature distinguishing *Johannsen* from *Bronson* may mean that the Minnesota court has adopted the public versus private road doctrine.<sup>232</sup> Under this doctrine, compensation is allowed for injuries that occur on private property and is denied for those injuries that occur on public property such as a sidewalk or public street.<sup>233</sup> This distinction finds its greatest support in a Lord Cozens-Hardy decision in which he held that an employee on a public road must be viewed as a member of the public, with no rights being conferred by an employment contract.<sup>234</sup>

Although Lord Cozens-Hardy's reasoning may be appealing because of its simplicity, it has correctly been rejected by most courts<sup>235</sup> and commentators<sup>236</sup> because "workmen's compensation problems cannot be solved by mechanical applications of law relating to rights in land, trespass, license and the like."<sup>237</sup> Consequently, if the Minnesota court in *Bronson* did adopt the private versus public way distinction it would do well to repudiate this mechanical and often unfair doctrine.

227. *See id.* at 550-51, 119 N.W.2d at 832.

228. 268 Minn. 1, 127 N.W.2d 678 (1964).

229. *Id.* at 7, 127 N.W.2d at 682; *see* Brief for Appellant at 10-11, *Bronson v. Joyner's Silver & Electroplating, Inc.*, 268 Minn. 1, 127 N.W.2d 678 (1964) (containing chart listing similarities between *Bronson* and *Johannsen*).

230. *See* 264 Minn. at 542, 119 N.W.2d at 827.

231. *See* 268 Minn. at 2, 127 N.W.2d at 679.

232. This doctrine is discussed in 1 A. LARSON, *supra* note 1, §§ 15.20-21.

233. *See id.*

234. *See* Longhurst v. John Stewart & Son, Ltd., [1916] 2 K.B. 803, 805, *aff'd*, [1917] A.C. 249.

235. *See* Jaynes v. Potlatch Forests, Inc., 75 Idaho 297, 299, 271 P.2d 1016, 1019 (1954) (not sound to say that employee on public highway is always there as member of public); *Brienza v. LeChase Constr. Corp.*, 17 A.D.2d 83, 85, 230 N.Y.S.2d 362, 363 (1962) (mere designation as public street is not sufficient reason to deny claimant's right to compensation).

236. *See, e.g.*, 1 A. LARSON, *supra* note 1, § 15.21.

237. *Id.*

### B. Dual Purpose Trips

Because a subjective determination of an employee's state of mind is frequently required, a trip made for both business and personal reasons, commonly referred to as a dual-purpose trip,<sup>238</sup> presents challenges when an attempt is made to determine whether an injury was suffered in the course of employment. Illustrative of the dual-purpose problems that may occur are situations in which an employee is requested by the employer to drop a letter in a mailbox on the employee's way home;<sup>239</sup> a salesperson is injured on the way home after spending the evening in an inn where he spent a few minutes trying to sell some of his employer's products to the inn owner;<sup>240</sup> or, a sorority house mother is injured in a

238. See generally *id.* §§ 18.00-44; 7 W. SCHNEIDER, *supra* note 1, §§ 1690-1693.

239. See *Locke v. County of Steele*, 223 Minn. 464, 470, 27 N.W.2d 285, 288 (1947) (awarding compensation to employee who slipped and fell on ice while attempting to mail letter). On similar facts, the South Carolina Supreme Court denied compensation. See *Mims v. Nehi Bottling Co.*, 218 S.C. 513, 63 S.E.2d 305 (1951) (denying compensation to employee who stopped at laundry before he reached mailbox and was killed from explosion at laundry). In *Bookman v. Lyle Culvert & Road Equip. Co.*, 153 Minn. 479, 190 N.W. 984 (1922), the posting of the employer's mail always coincided with the employee's homeward trip. Interestingly, in awarding compensation to the employee injured while driving home, the *Bookman* court did not do so based on the dual purpose rationale. Instead, the *Bookman* court regarded the case as falling within the ambit of the street-risk rule. For an explanation of the street-risk rule, see notes 48, 53 *supra*.

240. See *McCarty v. Twin City Egg & Poultry Ass'n*, 172 Minn. 551, 216 N.W. 239 (1927). In *McCarty* the claimant left his home a few hours before midnight with a drunken companion and drove 15 miles to a local inn for the alleged purpose of attempting to sell the innkeeper some of his employer's products. In denying compensation, the *McCarty* court stated:

That a servant with a fixed salary should of his own motion start out on work for his employer after ten o'clock at night and invite a drunken person as a companion is not the ordinary occurrence. When, in addition thereto, it is considered that in the morning relator would necessarily pass Hugo in going to his employer's office for instruction as to the day's work, it seems incredible that he would have taken a journey some 15 miles late at night to interview a restaurant keeper at Hugo.

*Id.* at 553, 216 N.W. at 239-40. Other courts have also denied compensation when there was little evidence of actual performance of a business function, or when the employee's business dealings appeared to be an afterthought. See *Simmons v. F.W. Dodge Corp.*, 270 Ala. 616, 617, 120 So. 2d 921, 922 (1960) (denying compensation when employee's automobile accident occurred at 2:00 a.m. after a night of partying); *Johnson v. McGehee Bros. Furniture Co.*, 256 So. 2d 741, 742 (La. App. 1971) (denying compensation when employee's automobile accident occurred after employee left a bar); *Leigh v. Dix*, 284 A.D. 919, 921, 134 N.Y.S.2d 494, 495 (1954) (per curiam) (denying compensation when factory superintendent appeared to visit company official on a social matter); *Kuethe v. State*, 191 Neb. 167, 168, 214 N.W.2d 380, 381 (1974) (per curiam) (state investment officer's dependents denied compensation when employee's accident occurred while driving home from a day of golf with a business acquaintance).

In the most recent Minnesota case presenting the problem of a mixed purpose, talk-

fall while on her way to purchase first-aid supplies for the house and to attend a religious ceremony.<sup>241</sup>

Most courts resolve the dual-purpose question by applying the lucid formula expounded by Justice Cardozo in *Marks' Dependents v. Gray*.<sup>242</sup> In *Marks* a plumber's helper, who was planning to drive to a neighboring town to meet his wife, was requested by his employer to repair some plumbing in that town.<sup>243</sup> The work would not have justified a special trip for the sole purpose of repairing the plumbing.<sup>244</sup> Shortly after starting on this trip, the employee was fatally injured in an automobile accident. In denying compensation, Justice Cardozo stated:

We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled . . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own . . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, it would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.<sup>245</sup>

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ing business during a social activity, the Minnesota Supreme Court upheld an award of dependency benefits to the employee's widow. See *Titus v. Fox Chem. Co.*, 254 N.W.2d 74 (Minn. 1977) (per curiam). In *Titus* the sole salesperson of a drug manufacturer was killed while on his way to a restaurant to dine with a possible customer and another friend. The employee and the two people he was going to meet at the restaurant planned on attending an Alcoholics Anonymous meeting that night. Arguably, the burden of proof required by the *Titus* court is in marked contrast with the court's earlier decision in *McCarty*.

241. See *Kaplan v. Alpha Epsilon Phi Sorority*, 230 Minn. 547, 42 N.W.2d 342 (1950), in which the court stated:

The rule as above stated clarifies the controlling principles applicable to the instant case. Assuming that relator here left the sorority house for the dominant purpose of attending religious services at Temple Israel for her own personal reasons, her accidental injuries, nevertheless, arose out of and in the course of her employment *if at the time of the accident, as a deviation from her own personal mission, she was in the act of going to the drugstore to obtain bandages for her employer.*

*Id.* at 552, 42 N.W.2d at 346 (emphasis in original).

242. 251 N.Y. 90, 167 N.E. 181 (1929). Justice Cardozo's *Marks* formula has received universal praise from commentators. See, e.g., 1 A. LARSON, *supra* note 1, § 18.12.

243. See *id.* at 92-93, 167 N.E. at 182.

244. See *id.*

245. *Id.* at 93, 167 N.E. at 183. Perhaps the best example of a case in which the *Marks* test was correctly applied to allow compensation is *Irwin-Neisler & Co. v. Industrial*

Justice Cardozo's dual-purpose rule allows compensation when the business portion of the trip would have been made in spite of the failure or absence of the private purpose.<sup>246</sup> Conversely, the trip will be viewed as a personal journey, and compensation denied, if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of the failure of the private purpose to occur.<sup>247</sup>

Interestingly, some courts, although purporting to follow the *Marks* rule, have interpreted Justice Cardozo's test to be one of dominant or principal purpose.<sup>248</sup> *Butler v. Nolde Brothers*<sup>249</sup> is illustrative of this interpretation. In *Butler* the employee, a route salesperson, was fatally injured on a dual-purpose trip. The Supreme Court of Appeals of Virginia, although purporting to adopt the *Marks* test, denied compensation, stating that the employee's fatal injury was incurred on a trip "for the principal purpose of a social visit with his friends . . . and with the incidental purpose of collecting from them for deliveries . . . previously made."<sup>250</sup> The court never adequately considered the question of whether the trip

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Comm'n, 346 Ill. 89, 178 N.E. 357 (1931) (per curiam). There, an employee who was about to leave for a vacation was requested by his employer to stop on his way back and make a study of why a product was not selling well in a particular area. While returning home from his vacation and after completing the requested sales study, he was injured in an automobile collision. In awarding compensation, the court stated that if the employee had not made the sales study someone else would have been sent to do the same job.

For additional cases awarding compensation under this theory, see *Anchorage Roofing Co. v. Gonzales*, 507 P.2d 501 (Alaska 1973) (business purpose of flight was compensable despite three-mile deviation to explore future hunting area); *U.S. Fiber Glass Indus. v. Uland*, 127 Ind. App. 278, 206 N.E.2d 385 (1965) (employment created necessity to travel to football game); *Rau v. Crest Fiberglass Indus.*, 275 Minn. 483, 148 N.W.2d 149 (1967) (business trip would have been made even if trip had not coincided with personal errand); *Downs v. Durbin Corp.*, 416 S.W.2d 242 (Mo. App. 1967) (orders to take lumber home before delivering it to employer's place of business justified compensation after accident on employee's homeward route). For well-reasoned decisions denying compensation based on the *Marks* theory, see *Manolakis v. Edison S.S. Corp.*, 15 A.D.2d 845, 224 N.Y.S.2d 519 (1962) (claimant's injury in employer's summer home not compensable); *Humphrey v. Quality Cleaners & Laundry*, 251 N.C. 47, 110 S.E.2d 467 (1959) (compensation denied to employee killed in own automobile being used to transport incidentally some cash of employer's).

246. See 1 A. LARSON, *supra* note 1, § 18.12.

247. See *id.*

248. See *Pohler v. T.W. Snow Constr. Co.*, 239 Iowa 1018, 1022, 33 N.W.2d 416, 419 (1948) (special errand for employer is essential character of trip); *Kaplan v. Alpha Epsilon Phi Sorority*, 230 Minn. 547, 550, 42 N.W.2d 342, 344 (1950) (dominant-purpose test); *Butler v. Nolde Bros.*, 189 Va. 932, 939, 55 S.E.2d 36, 43 (1949) (primary purpose of trip was personal and noncompensable).

249. 189 Va. 932, 55 S.E.2d 36 (1949).

250. *Id.* at 943, 55 S.E.2d at 41.

would have been made if the social visit had been cancelled.<sup>251</sup>

The dominant or principal-purpose formulation is an inaccurate and undesirable interpretation of the *Marks* rule. Justice Cardozo, in expounding this rule, specifically stated that an injury incurred on a trip in which a business purpose was a concurrent cause is compensable.<sup>252</sup> He defined concurrent cause as a cause that would have necessitated making the trip even if the personal objective were no longer present.<sup>253</sup> When this formulation is correctly applied, it does not require that the motives of the employee be weighed for the purpose of ascertaining the most important or compelling cause of the journey.<sup>254</sup> Yet, under the dominant purpose construction, a court must apply this highly subjective test in determining if the injury is compensable.<sup>255</sup>

Other courts have adopted the "no nice inquiry" approach to the dual-purpose problem.<sup>256</sup> Under this rule, "no nice inquiry will be made to determine the relative importance of a concurrent business and personal motive."<sup>257</sup> It is probable that courts that have adopted this approach have done so in reaction to the dominant or principal-purpose interpretation of the *Marks* test. For example, in *Cook v. Highway Casualty Co.*,<sup>258</sup> the Florida Supreme

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251. The *Butler* court indicated that although there was a business purpose, the business was such that it could have been accomplished equally as well at the time the employee normally transacted such business. Because the business could have been done at another time, the court concluded that the trip on which the employee was fatally injured was "more of a personal than a business nature." *Id.* at 942, 55 S.E.2d at 41. However, as Professor Larson has succinctly pointed out:

[I]t is not necessary, under this formula, that, on failure of the personal motive, the business trip would have been taken *by this particular employee at this particular time*. It is enough that someone sometime would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but if a special trip would have had to be made for this purpose, and if the employer got this necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or afterthought.

1 A. LARSON, *supra* note 1, § 18.13 (footnotes omitted).

252. *See Marks' Dependents v. Gray*, 251 N.Y. at 93, 167 N.E. at 183.

253. *See id.*

254. *See* 1 A. LARSON, *supra* note 1, § 18.13.

255. *See id.*

256. *See Phoenix Indem. Co. v. Industrial Accident Comm'n*, 31 Cal. 2d 856, 858, 193 P.2d 745, 747 (1948); *Cook v. Highway Cas. Co.*, 82 So. 2d 679, 682 (Fla. 1955); *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 575, 55 So. 2d 381, 390 (1951), *rev'd*, 59 So. 2d 294 (1952); *Tallent v. M.C. Lyle & Son*, 187 Tenn. 482, 483, 216 S.W.2d 7, 9 (1948).

257. *Cook v. Highway Cas. Co.*, 82 So. 2d 679, 682 (Fla. 1955).

258. 82 So. 2d 679 (Fla. 1955).

Court, in adopting the "no nice inquiry" rule, stated:

[T]he decisions of those courts which do not require the commission to weigh the business and personal motives and determine which is the dominant or compelling cause of the trip, are more consistent with the remedial purposes of our workmen's compensation act than is the more stringent rule of *Marks' Dependents v. Gray* . . . and we agree . . . that "no nice inquiry" will be made to determine the relative importance of a concurrent business and personal motive.<sup>259</sup>

The "no nice inquiry" approach, to the extent that it eliminates the weighing of motives, is consistent with the *Marks* rule.<sup>260</sup> Nevertheless, this approach should be rejected because it supplies no positive test with which to solve the many questions that are constantly arising. Moreover, the "no nice inquiry" rule could conceivably allow recovery even if the business purpose was infinitesimal.

The Minnesota Supreme Court has handled the dual-purpose problem in different ways. Initially, it formulated the "ordinary occurrence" theory.<sup>261</sup> Under this approach, unless undertaking the employer's business was an ordinary occurrence of the trip, compensation would be denied.<sup>262</sup> In *McCarty v. Twin City Egg & Poultry Association*,<sup>263</sup> an employee who left his home about 10:00 p.m. with a drunken companion and drove fifteen miles to a restaurant, for the alleged purpose of seeing the restaurant owner on business for his employer, was injured in a car accident.<sup>264</sup> Denying compensation, the court stated:

That a servant with a fixed salary should of his own motion start out on work for his employer after 10:00 at night and invite a drunken person as a companion is not the *ordinary occurrence*. When, in addition thereto, it is considered that in the morning relator would necessarily pass Hugo in going to his employer's office for instruction as to the day's work, it seems incredible that he should have taken a journey some 15 miles

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259. *Id.* at 682.

260. *See generally* 1 A. LARSON, *supra* note 1, § 18.13.

261. *See* *McCarty v. Twin City Egg & Poultry Ass'n*, 172 Minn. 551, 553, 216 N.W. 239, 239 (1927) ("That a servant with a fixed salary should of his own motion start out on work for his employer after ten o'clock at night and invite a drunken person as a companion is not the *ordinary occurrence*." (emphasis added).

262. *See id.*

263. 172 Minn. 551, 216 N.W. 239 (1927).

264. *See id.* at 553, 216 N.W. at 240.

late at night to interview a restaurant keeper at Hugo.<sup>265</sup>

Subsequently, in *Olson v. Trinity Lodge*,<sup>266</sup> the Minnesota Supreme Court adopted the dominant or principal-purpose rule.<sup>267</sup> In *Olson* the employee had but a single destination, the employer's lodge building, to which he was en route for the two distinct purposes of personally enjoying the comforts of his private room as well as the labors of tending the employer's furnace.<sup>268</sup> In awarding compensation, the court stated:

If a movement on the part of an employe is undertaken from a mixture of motives, the major motive or dominant purpose thereof, as a general rule, controls in determining whether an injury sustained in the course of such movement arises out of and in the course of his employment.<sup>269</sup>

As previously mentioned, the dominant or principal-purpose formulation is an inaccurate and undesirable interpretation of the *Marks* rule.<sup>270</sup> Fortunately, in a 1967 decision, the Minnesota Supreme Court directly adopted the *Marks* rule. In *Rau v. Crest Fiberglass Industries*,<sup>271</sup> the employee, a bookkeeper and secretary-treasurer of the employer, received express instructions to deliver to a creditor an important contract evidencing security for a debt.<sup>272</sup> The employee, after delivering the contract and purchasing a bottle of liquor,<sup>273</sup> was injured in an automobile accident as she drove toward a restaurant to purchase lunch for her children. Citing *Marks*, the Minnesota Supreme Court indicated that the injury was compensable because work would have necessitated the employee's errand even had her personal purposes been abandoned.<sup>274</sup>

265. *Id.* at 553, 216 N.W. at 239-40 (emphasis added).

266. 226 Minn. 141, 32 N.W.2d 255 (1948).

267. *Id.* at 146, 32 N.W.2d at 258 (dominant purpose controls in determining whether injury arises out of and in the course of employment).

268. *See id.*

269. *Id.*

270. *See* notes 248-55 *supra* and accompanying text.

271. 275 Minn. 483, 148 N.W.2d 149 (1967).

272. *See id.* at 484, 148 N.W.2d at 150-51.

273. *See id.*

274. *See id.* at 485-86, 148 N.W.2d at 151-52. In *Williams v. Hoyt Constr. Co.*, 306 Minn. 59, 237 N.W.2d 339 (1975), however, the Minnesota Supreme Court may have returned to the dominant-purpose rule when in dictum it stated:

The dominant-purpose rule was developed to deal with travel having both personal and business purposes. The employee is covered by the Workmen's Compensation Act if the business purpose is the dominant one. The cases cited by relator in support of her contention that the decedent was protected by the dominant-purpose rule are not controlling here, for none of them deals with situa-

Properly applied, the *Marks* test establishes workable limitations and, at the same time, furthers the humanitarian purpose<sup>275</sup> of the Minnesota Workers' Compensation Act. Accordingly, the Minnesota court should follow the precedent established in *Rau*.

### C. Home as Work Place

Employees who perform work at home may sustain an injury during the coming and going trip or during the performance of the work itself. The dual-purpose doctrine is a reliable guide for indicating when compensation is proper as to the coming and going aspect.<sup>276</sup> If the work being performed is done at home solely be-

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tions where one employee engages in two separate and distinct trips; rather, they all involve travel undertaken for the purpose of conducting both business and personal errands, with the personal errand requiring only a slight deviation in time and space from the business errand. A severable side trip, such as is present in this case, will defeat the application of the dominant-purpose rule.

*Id.* at 69-70, 237 N.W.2d at 346 (footnotes omitted). If so, the Minnesota Supreme Court is misconstruing the *Marks* test.

275. See S. HOROVITZ, *supra* note 1, at 470, in which he states:

[C]ompensation laws were enacted as a humanitarian measure, to create a new type of liability—liability without fault—to make the industry that was responsible for the injury to bear a major part of the burdens resulting therefrom. It was a revolt from the old common law and creation of a complete substitute therefor.

*Id.* The Minnesota Supreme Court has on several occasions indicated its agreement with Professor Horowitz's comments. See, e.g., *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960), in which the court stated:

The history of the legislation resulting in our Workmen's Compensation Act, and the beneficial and humane purposes intended by the statute, call for a liberal construction of this law. Clearly, the legislature never intended that the injured employee should be met in his application for compensation with stringent and technical rules and regulations. It was the legislative intent from the beginning that he should receive his just desserts without the burden of expensive litigation.

*Id.* at 317-18, 103 N.W.2d at 884.

276. Professor Larson explains:

As to the going and coming trip, the basic mixed-purpose doctrine will once more be found the most reliable guide. Although it is not always referred to in the opinions, it adequately explains most of the cases in this area, both those awarding compensation and those denying it.

1 A. LARSON, *supra* note 1, § 18.31, at 4-260 (footnotes omitted). Professor Larson's analysis is adequately borne out by case law. See, e.g., *Allen's Dairy Prod. Co. v. Whittington's Dependents*, 230 Miss. 285, 92 So. 2d 842 (1957) (milk salesman killed on way home where he made out daily reports; compensation awarded); *Gennarelli v. Spruce-Up Cleaners, Inc.*, 34 A.D.2d 1075, 312 N.Y.S.2d 336 (1970) (tailor who worked at home killed on journey home; compensation proper); *Meyer v. Western Fire Ins. Co.*, 425 S.W.2d 628 (Tex. 1968) (compensation awarded service supervisor who performed part of duties at home and part at employer's factory).

In questions involving the employee's home as a work place, however, the only Minnesota decision, *Corcoran v. Teamsters & Chauffeurs Joint Council No. 32*, 209 Minn. 289, 297 N.W. 4 (1941), did not use a dual-purpose analysis. Rather, the supreme court focused upon the quantity and regularity of the work performed at home, and the special

cause of convenience to the employee, however, the coming and going is not a business trip within the meaning of the dual-purpose rule.<sup>277</sup> In these instances, only the actual performance of the work itself falls within the course of employment requirement.<sup>278</sup>

If the injury occurs while the business activity is actually being performed at home, compensation is proper.<sup>279</sup> This is so even though the service being performed at home is casual or is of relatively little importance.<sup>280</sup> Illustrative of this general rule is *Kossack v. Town of Bloomfield*.<sup>281</sup> In *Kossack* a policeman was injured while cleaning his gun at home. Although the policeman probably would not have been granted compensation if he was injured while driving home, the actual cleaning of the gun brought the injury within the scope of the compensation act.<sup>282</sup>

#### D. Deviations

As a general rule, deviation from a business trip for personal reasons takes an employee out of the course of employment until the business trip is resumed,<sup>283</sup> unless the deviation is so minimal as to be disregarded as insubstantial.<sup>284</sup> Thus, an employee travel-

circumstances of the employee's union job that made it necessary for him to perform work at home.

277. For example, injuries incurred by teachers on their way to school are not compensable because work performed at home is for the convenience of the employee. *See, e.g.,* *Wilson v. Workers' Compensation Appeals Bd.*, 16 Cal. 3d 181, 545 P.2d 225, 127 Cal. Rptr. 313 (1976); *Stoskin v. Board of Educ.*, 11 Md. App. 355, 274 A.2d 397 (1971). *See also* 1 A. LARSON, *supra* note 1, § 18.33, at 4-273.

278. *See* notes 279-82 *infra*.

279. *See* *American Red Cross v. Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975); *Employers' Liab. Assurance Corp. v. Henderson*, 37 Ga. App. 238, 139 S.E. 688 (1927); *Kossack v. Town of Bloomfield*, 63 N.J. Super. 322, 164 A.2d 653 (Essex County Ct. 1960); 1 A. LARSON, *supra* note 1, § 18.34.

280. *See* 1 A. LARSON, *supra* note 1, § 18.34.

281. 63 N.J. Super. 322, 164 A.2d 653 (Essex County Ct. 1960).

282. *See id.* at 322-25, 164 A.2d at 654-55; 1 A. LARSON, *supra* note 1, § 18.34, at 4-275.

283. 1 A. LARSON, *supra* note 1, § 19.00; *see* *Bailey v. Industrial Comm'n*, 2 Ariz. App. 518, 410 P.2d 140 (1966); *General Plant Protection Corp. v. Industrial Comm'n*, 146 Colo. 191, 192-94, 361 P.2d 138, 138-39 (1961); *Woodley v. Rossi*, 152 Conn. 1, 202 A.2d 136 (1964); *Falkum v. Daniel Starch & Staff*, 271 Minn. 277, 135 N.W.2d 693 (1965); *Wolverton v. Hartford Accident & Indem. Co.*, 254 S.W.2d 834 (Tex. Civ. App. 1952). For a general discussion of the deviation doctrine, *see* 1 A. LARSON, *supra*, §§ 19.00-63; 7 W. SCHNEIDER, *supra* note 1, §§ 1680-1687; Comment, '*Deviation From Route and Return*' in *Michigan Workmen's Compensation Cases*, 17 U. DET. L.J. 26 (1953).

284. 1 A. LARSON, *supra* note 1, § 19.00; *see* *Nehring v. Minnesota Mining & Mfg. Co.*, 193 Minn. 169, 258 N.W. 307 (1935); *Johnson v. Johnson*, 30 Minn. Workers' Comp. Dec. 304 (1978).

In *Nehring* the employee was returning home after responding to his employer's spe-

ing for business purposes will journey outside the coverage of the Workers' Compensation Act if a severable sidetrip is made. As Chief Justice Sheran succinctly noted in *Williams v. Hoyt Construction Co.*,<sup>285</sup> coverage in these situations "is suspended until the employee completes the sidetrip or resumes travel toward his business goal."<sup>286</sup> The Minnesota rule is consistent with the majority rule that, according to Professor Larson, requires an employee who has made a personal sidetrip, to "get back on beam" before being deemed to have resumed the business trip.<sup>287</sup>

Illustrative of the general rule is *Mills v. Standard Parts Service Co.*,<sup>288</sup> in which the Minnesota Supreme Court affirmed the compensation court's decision not to award benefits to an employee who, as the president of a savings and loan association, sustained an injury while returning to work from a luncheon appoint-

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cial request to replace a fuse. On this journey he "stopped at a wayside store, bought some bananas and ice cream, mounted the motorcycle, and proceeded toward home" when he was fatally injured. 193 Minn. at 170, 258 N.W. at 307. The court affirmed an award of compensation stating, "[t]hat the employee stopped at a store on the way home to buy and take home some ice cream and fruit cannot be regarded as a departure from his employment. The store was on the road he was traveling, and the stop was but momentary." *Id.* at 174, 258 N.W. at 309.

In *Johnson* the compensation court commented:

It is difficult for us to acknowledge that an employee, who was instructed to travel in a northeasterly direction some six miles by his employer, can subsequently travel almost five miles south, drink beer, start back on what appears to be a trip home for dinner, still be four plus miles south of his original departure, and some ten miles from his destination, can be considered in the scope and course of employment. . . . It appears clear to us that the employee, Kent Johnson, deviated from his duties when he embarked upon the sojourn to Storm's Bar. His return to his duties did not commence when he left Storm's Bar some four plus miles south of his original departure point. The employee deviated from his employment. . . .

*We do not find four plus miles to be an insubstantial deviation.*

30 Minn. Workers' Comp. Dec. at 306-07 (emphasis added).

285. 306 Minn. 59, 237 N.W.2d 339 (1975).

286. *Id.* at 69, 237 N.W.2d at 346. See also *Funk v. A.F. Scheppmann & Son Constr. Co.*, 294 Minn. 483, 199 N.W.2d 791 (1972) (per curiam); *Johnson v. Range Blacktop Co.*, 278 Minn. 288, 153 N.W.2d 823 (1967); *Peterson v. Taylor*, 255 Minn. 220, 96 N.W.2d 247 (1959); *Kiley v. Sward-Kemp Drug Co.*, 214 Minn. 548, 9 N.W.2d 237 (1943); *Cavilla v. Northern States Power Co.*, 213 Minn. 331, 6 N.W.2d 812 (1942); *Dahley v. Ely & Walker*, 196 Minn. 428, 265 N.W. 284 (1936) (per curiam); *Hasslen v. Carlson & Hasslen*, 180 Minn. 473, 231 N.W. 188 (1930); *State ex rel. Niessen v. District Court*, 142 Minn. 335, 172 N.W. 133 (1919).

287. 1 A. LARSON, *supra* note 1, § 19.35, at 4-337. See also *Retail Credit Co. v. Coleman*, 227 Miss. 791, 86 So. 2d 666 (1956); *Allison v. Brown & Horsch Insulation Co.*, 98 N.H. 434, 102 A.2d 493 (1954); *White v. Frank Z. Sindlinger, Inc.*, 30 N.J. Super. 525, 105 A.2d 437 (1954); *Clark v. Burton Lines, Inc.*, 272 N.C. 433, 158 S.E.2d 569 (1968).

288. 269 Minn. 501, 131 N.W.2d 546 (1964).

ment.<sup>289</sup> Although the employee testified that he had discussed banking business during lunch,<sup>290</sup> the court denied compensation stating:

If the dominant purpose of the luncheon meeting was personal, Mills was not in the course of his employment when he slipped. Even though it be reasoned that the luncheon meeting represented a deviation from a business-connected walk from one store location to the other, Mills would not have returned to the direct route between these places of business until he reached the south curblin of Laurel. He was hurt at a place where he would not have been if the direct route had been followed.<sup>291</sup>

Traveling salespeople are also subject to the personal sidetrip rule.<sup>292</sup> For example, in *Rhea v. Overholt*,<sup>293</sup> the employee, a traveling salesman, was engaged in the business of writing hail insurance.<sup>294</sup> His working territory was "wherever they sent me in the state of Minnesota."<sup>295</sup> The employer furnished the employee with an automobile.<sup>296</sup> On the day of his injury, the employee went to the employer's office to receive sales instructions.<sup>297</sup> After receiving the instructions, the employee remained at the office until 4:00 and then left for a municipal parking lot, unlocked his car, and placed in it his portfolio containing the instructions pertaining to his work in the designated territory.<sup>298</sup> The employee then locked his car and started for a local clothing store where he had left five recently purchased shirts for alterations.<sup>299</sup> On the way back to the parking lot, the employee stopped at a tavern to an-

289. *See id.* at 502, 131 N.W.2d at 547.

290. *See id.* at 502-03, 131 N.W.2d at 547-48.

291. *Id.* at 503, 131 N.W.2d at 548.

292. *See Rhea v. Overholt*, 222 Minn. 467, 25 N.W.2d 656 (1946); *Lunde v. Congoleum-Nairn, Inc.*, 211 Minn. 487, 488-89, 1 N.W.2d 606, 607 (1942).

Although traveling salespeople are subject to the personal sidetrip rule they are generally covered by the compensation act under the *Howlett* rule. In *Howlett v. Midwest Distributions, Inc.*, 202 Minn. 247, 277 N.W. 913 (1938), the Minnesota court stated:

When the employer's business requires an employe to travel in a specified territory, it is the duty of the employer to afford the employe an opportunity of returning from the territory under the employer's protection. A traveling employe is in the course of his employment on the return trip from his territory as well as on the outward trip.

*Id.* at 251, 277 N.W. at 915.

293. 222 Minn. 467, 25 N.W.2d 656 (1946).

294. *See id.* at 468, 25 N.W.2d at 657.

295. *Id.* at 468-69, 25 N.W.2d at 657.

296. *See id.* at 469, 25 N.W.2d at 657.

297. *See id.*

298. *See id.*

299. *See id.*

swer a "call of nature."<sup>300</sup> While alighting from the tavern, the employee fell and sustained an injury.<sup>301</sup> Although the compensation judge found the employee to have sustained an injury that arose out of and in the course of employment, both the compensation court and the Minnesota Supreme Court denied compensation.<sup>302</sup> In so holding, the supreme court accepted the employer's argument that after the employee left the parking lot and went to the clothing store to get the shirts, there was a deviation from the employment, and that such a deviation was continuous until the time when the employee returned to the parking lot where his car was located.<sup>303</sup>

Similarly, in *Kayser v. Carson Pirie Scott & Co.*,<sup>304</sup> another traveling salesperson was denied compensation because he departed on a personal errand.<sup>305</sup> In *Kayser* the employee drove his daughter to a town in which he did not contemplate selling any merchandise.<sup>306</sup> On his way back from the personal errand to the town in which he was to transact business, the employee was involved in a car accident resulting in his death.<sup>307</sup> In affirming the compensation court's decision denying compensation, the court stated:

That [the] deceased intended to transact business of his employer at New Ulm upon his return has no effect on the conclusion to be reached. That call had nothing to do with the trip to Pipestone, and he did not enter the course of his employment merely upon the fulfillment of his personal errand in Pipestone and the start of his return trip . . . . In any event, the only travel required by the employment on the day in question was to New Ulm and return. The travel to Pipestone and return was his own and so were the risks. Being on his own business on the outgoing trip, he was still on that business while returning, at least until he reached New Ulm [the original point of departure].<sup>308</sup>

Although the result in cases like *Kayser* may seem harsh, the strict geometrical theory gives consistency and predictability to the law. Therefore, deviation cases should be decided by examining

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300. *Id.* at 470, 25 N.W.2d at 657.

301. *See id.*

302. *Id.* at 469, 473, 25 N.W.2d at 657, 659.

303. *See id.* at 471-73, 25 N.W.2d at 658-59.

304. 203 Minn. 578, 282 N.W. 801 (1938).

305. *See id.* at 582, 282 N.W. at 803-04.

306. *See id.* at 579-80, 282 N.W. at 802-03.

307. *See id.* at 580, 282 N.W. at 802.

308. *Id.* at 582, 282 N.W. at 803.

the geometric path the employee followed while performing the requested task.

#### IV. EMPLOYEE ACTIVITY PROBLEMS

##### A. *Injuries Resulting from Acts of Nature*

Injuries caused by lightning,<sup>309</sup> exposure,<sup>310</sup> windstorms,<sup>311</sup> earthquakes,<sup>312</sup> and other acts of nature<sup>313</sup> have produced disa-

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309. *Compare* State *ex rel.* Peoples Coal & Ice Co. v. District Court, 129 Minn. 502, 153 N.W. 119 (1915) (awarding compensation to employee struck by lightning while taking shelter under a tree) *with* J.I. Case Co. v. Industrial Comm'n, 36 Ill. 2d 386, 223 N.E.2d 847 (1966) (compensation denied employee struck by lightning in employer's warehouse) *and* Schmidt v. Adams & Sons Grocer Co., 377 S.W.2d 564 (Mo. App. 1964) (compensation denied employee struck by lightning while loading employer's truck) *and* Lickfett v. Jorgenson, 179 Minn. 321, 229 N.W. 138 (1930) (compensation denied employee struck by lightning while working with a road construction crew).

310. *Compare* Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 310-12, 97 A. 320, 322-23 (1916) (awarding compensation to insurance solicitor required to travel in very cold weather while attempting home solicitations) *and* Pettit v. Ben F. Walker Framing Co., 176 So. 2d 897 (Fla. 1965) (heart attack suffered as a result of heat prostration compensable) *and* American Freight Forwarding Corp. v. Industrial Comm'n, 31 Ill. 2d 293, 296-97, 201 N.E.2d 399, 401 (1964) (awarding compensation to employee suffering frostbite after working nine and one half hours in subzero weather) *and* State *ex rel.* Nelson v. District Court, 138 Minn. 260, 164 N.W. 917 (1917) (awarding compensation to janitor who suffered frostbite while shoveling employer's walk) *and* Mead v. Missouri Valley Grain, Inc., 178 Neb. 553, 134 N.W.2d 243 (1965) (employee required to work in unprotected box cars in below zero weather entitled to compensation benefits) *and* Globe Co. v. Hughes, 442 S.W.2d 253, 256 (Tenn. 1969) (when work exposes employee to long hours of freezing weather compensation proper) *with* Phillips v. Borg-Warner Corp., 32 Ohio St. 2d 266, 291 N.E.2d 736 (1972) (exposure to extreme cold weather not an injury even when resulting in derangement of bodily functions) *and* Weicher v. Insurance Co. of North America, 434 S.W.2d 104, 107 (Tex. 1968) (compensation denied to employee suffering from severe heat exhaustion) *and* Robinette v. Kayo Oil Co., 210 Va. 376, 171 S.E.2d 172 (1969) (death resulting from pneumonia caused by several days exposure to rain and snow not compensable).

311. *Compare* Mobile & O.R. Co. v. Industrial Comm'n, 28 F.2d 228 (E.D. Ill. 1928) (applying Illinois law) (denying compensation to employee injured in windstorm) *and* Decatur-Macon County Fair Ass'n v. Industrial Comm'n, 69 Ill. 2d 262, 371 N.E.2d 597 (1977) (caretaker of fairgrounds killed by tornado, award of compensation reversed) *and* Crow v. Americana Crop Hail Pool, Inc., 176 Neb. 260, 125 N.W.2d 691 (1964) (compensation denied to insurance adjuster killed by tornado while driving to town pursuant to employer's instructions) *with* Inland Steel Co. v. Industrial Comm'n, 41 Ill. 2d 70, 241 N.E.2d 450 (1968) (windstorm blew roof on employee; compensation proper) *and* Arrington v. Goldstein, 23 N.J. Super. 103, 92 A.2d 630 (1952) (employee injured in windstorm entitled to compensation) *and* Merrill v. Penasco Lumber Co., 27 N.M. 632, 638-39, 204 P. 72, 74 (1922) (compensation proper when presence of trees increased dangerous effect of windstorm).

312. *Compare* Enterprise Dairy Co. v. Industrial Comm'n, 202 Cal. 247, 259 P. 1099 (1927) (*per curiam*) (awarding compensation to employee injured in earthquake) *and* London Guarantee & Accident Co. v. Industrial Accident Comm'n, 202 Cal. 239, 259 P.

greement among the courts on the question of whether compensation is appropriate.<sup>314</sup> In determining the compensability of injuries caused by these forces, courts have essentially used three theories—increased risk, actual risk, and positional risk.<sup>315</sup>

The Minnesota rule is set forth in *State ex rel. Peoples Coal & Ice Co. v. District Court*.<sup>316</sup> In *Peoples Coal & Ice Co.*, an ice deliveryman was struck by lightning while on his route. In commenting on the appropriate test for compensation the court stated:

If the deceased was exposed to injury from lightning by reason of his employment, something more than a normal risk to which all are subject, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one "arising out of employment."<sup>317</sup>

The *Peoples Coal & Ice Co.* court followed the well established increased-risk rule<sup>318</sup> in allowing compensation, stating "the necessity of prompt daily deliveries required the drivers to complete

1096 (1927) *with cf.* *Whetro v. Awkerman*, 383 Mich. 235, 174 N.W.2d 783 (1970) (dictum). In *Whetro* the Michigan Supreme Court in a plurality opinion held that acts of God "whether it be a tornado, lightning, earthquake, or flood" are compensable if they are "the occasion of the injury." *Id.* at 241-43, 174 N.W.2d at 785-86. Chief Justice Brennan's dissenting opinion indicated, however, that such injuries are not compensable in the absence of proximate causation. *See id.* at 249-50, 174 N.W.2d at 787 (Brennan, C.J., dissenting).

313. *Compare* *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933) (salesman contracted Rocky Mountain spotted fever when trip required travel into territory infested with woodticks; compensation proper) *and* *Engels Cooper Mining Co. v. Industrial Accident Comm'n*, 183 Cal. 714, 192 P. 845 (1920) (compensation proper for employee contracting influenza while caring for ill coemployees at direction of company superintendent) *and* *Lothrop v. Hamilton Wright Organizations, Inc.*, 45 A.D.2d 784, 356 N.Y.S.2d 730 (1974) (death benefits awarded after decedent contracted infectious hepatitis in foreign country with unsanitary conditions) *and* *Herdick v. New York Zoological Soc'y*, 45 A.D.2d 120, 356 N.Y.S.2d 706 (1974) (compensation granted employee contracting tuberculosis from infected animal at zoo) *with* *Pattiani v. Industrial Accident Comm'n*, 199 Cal. 596, 250 P. 864 (1926) (denying compensation to employee contracting typhoid fever in city in which said fever was rampant) *and* *Richardson v. Greenberg*, 188 A.D. 248, 176 N.Y.S. 651 (1919) (denying compensation to stableman for infectious disease contracted from diseased horse).

314. For a general discussion of the compensability of injuries resulting from acts of nature, see Davis, *Workmen's Compensation*, 34 J. AM. TRIAL LAW. A. 229, 334 (1972); Comment, *Workman's Compensation Claims Arising Out of Injuries Caused by Lightning*, 15 ALB. L. REV. 177 (1951).

315. *See generally* 1 A. LARSON, *supra* note 1, §§ 6.50, 10.00-33(d).

316. 129 Minn. 502, 153 N.W. 119 (1915).

317. *Id.* at 503-04, 153 N.W. at 119.

318. *See, e.g.*, *Bales v. Covington*, 312 Ky. 551, 554, 228 S.W.2d 446, 448 (1950); *Kaiser*

their routes in substantial disregard of weather conditions."<sup>319</sup> As indicated by the *Peoples Coal & Ice Co.* decision, the determining factor in granting compensation under the increased-risk test is a greater likelihood of injury to an employee than to the general public;<sup>320</sup> if employment subjects an employee to additional danger, compensation is proper.<sup>321</sup>

Unfortunately, there is little uniformity among courts that adhere to the increased-risk theory; opposite results have been reached in seemingly indistinguishable fact situations.<sup>322</sup> The inconsistency in this area is probably due to differing definitions of the scope of the term "general public."<sup>323</sup> For example, the Massachusetts court denied compensation to a laborer whose foot froze while he worked outside before dawn in extremely cold weather<sup>324</sup> because "in the performance of his work, there is nothing to show that the employee was exposed to a greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather."<sup>325</sup> On the other hand, the Texas court took a more liberal view when it allowed compensation to the widow of an employee who died from a heat stroke.<sup>326</sup>

In the case before us the very work which the deceased was doing for his employer exposed him to greater hazard from heat stroke than the general public was exposed to for the simple reason that the general public were not pushing wheelbarrow loads of sand in the hot sun on that day.<sup>327</sup>

Most courts, however, have required that the hazard be more directly connected with the job. Heat from molten lead,<sup>328</sup> reflected sunlight,<sup>329</sup> and objects that attract lightning<sup>330</sup> have been found

v. Industrial Comm'n, 136 Ohio St. 440, 442, 26 N.E.2d 449, 451 (1940); 1 A. LARSON, *supra* note 1, § 8.11.

319. 129 Minn. at 502-03, 153 N.W. at 119.

320. *See id.* at 503-04, 153 N.W. at 119.

321. *Id.*; *see* 1 A. LARSON, *supra* note 1, § 6.30.

322. *See* notes 309-15 *supra* and accompanying text.

323. *See* 1 A. LARSON, *supra* note 1, § 8.42.

324. *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935).

325. *Id.* at 545-46, 198 N.E. at 761.

326. *American Gen. Ins. Co. v. Webster*, 118 S.W.2d 1082 (Tex. Civ. App. 1938).

327. *Id.* at 1085-86.

328. *See Fields v. Tompkins-Johnston Plumbing Co.*, 224 N.C. 841, 32 S.E.2d 623 (1945).

329. *See McNeil v. Omaha Flour Mills Co.*, 129 Neb. 329, 261 N.W. 694 (1935).

330. In the following cases compensation was granted because metal was found to have attracted lightning: *Hassell Iron Works Co. v. Industrial Comm'n*, 70 Colo. 386, 201 P. 894 (1921); *City of Atlanta v. Parks*, 60 Ga. App. 16, 21-22, 2 S.E.2d 718, 722 (1939);

to be risk-increasing factors. The Minnesota Supreme Court has also had little difficulty in finding additional job-related hazards. For example, the *Peoples Coal & Ice Co.* court indicated that an iron fence near the employee may have attracted the lightning.<sup>331</sup>

Interestingly, while professing to follow the increased-risk rule, some courts have established a "contact-with-the premises" exception.<sup>332</sup> Under this exception, when an employee has been injured by contact with part of the occupational surroundings, regardless of the actuating force, a sufficient causal relation is established and increased risk need not be shown.<sup>333</sup> This doctrine is well illustrated by a statement from the House of Lords: "If [a] bomb injures a workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him he can recover unconditionally."<sup>334</sup>

While the contact-with-the premises exception has never been directly adopted in Minnesota, the Minnesota Supreme Court ap-

*Mathis v. Ash Grove Lime & Portland Cement Co.*, 127 Kan. 93, 272 P. 183 (1928); *Charon's Case*, 321 Mass. 694, 75 N.E.2d 511 (1947); *Van Kirk v. Hume-Sinclair Coal Mining Co.*, 226 Mo. App. 1137, 49 S.W.2d 631 (1932); *Sullivan v. Roman Catholic Bishop*, 103 Mont. 117, 61 P.2d 838 (1936); *Emmick v. Hanrahan Brick & Ice Co.*, 206 A.D. 580, 201 N.Y.S. 637 (1923); *Pope v. Goodson*, 249 N.C. 690, 698, 107 S.E.2d 524, 529-30 (1959); *Consolidated Pipe Line Co. v. Mahon*, 152 Okla. 72, 3 P.2d 844 (1931); *Oman Constr. Co. v. Hodge*, 205 Tenn. 627, 329 S.W.2d 842 (1959); *Mason-Dixon Lines v. Lett*, 201 Tenn. 171, 297 S.W.2d 93 (1956); *United States Fidelity & Guar. Co. v. Rochester*, 281 S.W. 306 (Tex. Civ. App.), *aff'd*, 115 Tex. 404, 283 S.W. 135 (1926) (per curiam).

In the following cases compensation was granted because wet surroundings attracted lightning: *Truck Ins. Exch. v. Industrial Accident Comm'n*, 77 Cal. App. 2d 461, 175 P.2d 884 (1946); *Lyng v. Rao*, 72 So. 2d 53 (Fla. 1954); *McKiney v. Reynolds & Manley Lumber Co.*, 79 Ga. App. 826, 829-30, 54 S.E.2d 471, 473 (1949); *Bauer's Case*, 314 Mass. 4, 49 N.E.2d 118 (1943); *Jackson v. Bailey*, 234 Miss. 697, 107 So. 2d 593 (1958); *Bergren v. S.E. Gustafson Constr. Co.*, 75 S.D. 497, 68 N.W.2d 477 (1955).

Trees have also been found to be efficient conductors resulting in compensation awards. *See Chiullo De Luca v. Board of Park Comm'rs*, 94 Conn. 7, 107 A. 611 (1919); *Fort Pierce Growers Ass'n v. Storey*, 158 Fla. 192, 29 So. 2d 205 (1946); *State ex rel. Peoples Coal & Ice Co. v. District Court*, 129 Minn. 502, 153 N.W. 119 (1915).

331. *See* 129 Minn. at 503, 153 N.W. at 119. Similarly, in *Esparaza v. Hollandale Asparagus Growers Ass'n*, 20 Minn. Workmen's Comp. Dec. 48 (1957), the compensation court held that the widower of an employee killed by lightning while working in a field was entitled to compensation because the nature of the terrain and "other conditions" made the employee more susceptible to being struck by lightning.

332. The leading American authority on this rule is *Caswell's Case*, 305 Mass. 500, 26 N.E.2d 328 (1940). In that case an employee was injured by a wall blown over by a hurricane. *Id.* at 501, 26 N.E.2d at 329. Other jurisdictions have followed the Massachusetts courts' lead. 1 A. LARSON, *supra* note 1, § 8.30 (1979). *See generally* 6 W. SCHNEIDER, *supra* note 1, § 1552.

333. *See* note 332 *supra*.

334. *Brooker v. Thomas Borthwick & Sons (Australasia), Ltd.*, [1933] A.C. 669, 678.

parently used this theory to allow recovery in *Dunnigan v. Clinton Falls Nursery Co.*<sup>335</sup> In *Dunnigan* the employee, while working in an open field, was injured when a flash of lightning struck his team of horses.<sup>336</sup> The horses fell forward and caused a jerk on the lines wrapped around the employee's hands.<sup>337</sup> The sudden stopping of the harrow while he was walking immediately behind it, coupled with the jerk and the momentum of his body, caused the employee to fall on the harrow teeth and fracture his skull.<sup>338</sup> In its brief opinion, the court emphasized the fact that the injury was not caused by lightning, but resulted from the employee striking his head on the harrow teeth.<sup>339</sup> It is uncertain whether the *Dunnigan* court would not have granted compensation if the lightning had struck the employee directly.

Some courts have rejected the increased-risk rule and, in its place, have apparently adopted an actual-risk theory.<sup>340</sup> This theory is a more liberal approach to the problem of determining compensability of injuries caused by acts of nature.<sup>341</sup> Under the actual-risk theory, compensation is allowed if employment exposes an employee to any risk of injury.<sup>342</sup> Significantly, the likelihood of similar harm to others in the community is not examined.<sup>343</sup> This theory is especially applicable to exposure cases, because the danger of freezing or sunstroke is common to many people in a designated area. For example, several courts applying the increased-risk theory have denied compensation to employees who suffered a heat stroke,<sup>344</sup> or exposure,<sup>345</sup> because everyone in the

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335. 155 Minn. 286, 193 N.W. 466 (1923).

336. *See id.* at 287, 193 N.W. at 466.

337. *See id.* at 288-89, 193 N.W. at 466-67.

338. *See id.* at 287-89, 193 N.W. at 466-67.

339. *Id.*

340. *See* *Harding Glass Co. v. Albertson*, 208 Ark. 866, 869, 187 S.W.2d 961, 963 (1945) (glass cutter died from heat stroke); *McKiney v. Reynolds & Manley Lumber Co.*, 79 Ga. App. 826, 54 S.E.2d 471 (1949) (worker in lumber yard struck by lightning); *Hughes v. Trustees of Saint Patrick's Cathedral*, 245 N.Y. 201, 156 N.E. 665 (1927) (per curiam) (heat stroke); *Deziley v. Semet-Solvay Co.*, 272 A.D. 985, 72 N.Y.S.2d 809 (1947) (employee struck by lightning enroute to job); *Eagle River Bldg. & Supply Co. v. Peck*, 199 Wis. 192, 225 N.W. 690 (1929) (foot frozen in extreme weather).

341. *See* 1 A. LARSON, *supra* note 1, §§ 6.40, 8.43.

342. *See id.*

343. *See* note 340 *supra*.

344. *See* *Weicher v. Insurance Co. of North America*, 434 S.W.2d 104 (Tex. 1968). In *Weicher* the employee proved that insufficient ventilation in the employer's plant caused a heat stroke. Nevertheless, the Texas court denied compensation because the employee had not proved that the conditions at work intensified the natural heat outside to which the

surrounding area was subject to the same risk. Courts that apply the actual-risk theory have allowed compensation in similar situations because the employment required the employee to be exposed to the injury-causing harm.<sup>346</sup> The actual-risk theory eliminates the problem of defining the scope of the term "general public" found in the increased-risk theory.<sup>347</sup>

A small minority of courts has adopted a more liberal test—the positional-risk theory.<sup>348</sup> Under this approach, compensation is allowed when employment causes an employee to be in the position in which the injury is received, regardless of the risk involved.<sup>349</sup> *Aetna Life Insurance Co. v. Industrial Commission*<sup>350</sup> is illustrative of this approach. In *Aetna Life Insurance Co.*, the Colorado court allowed recovery for the death of a farmhand killed by lightning.<sup>351</sup> The theory that supported compensation was summarized in a concurring opinion:

[W]hen one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any person then and there present would have met irrespective of his employment, that accident is one "arising out of" the employment of the person so injured.<sup>352</sup>

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general public was subjected. *Id.* at 107-09. Similarly, in *Lewis v. Industrial Comm'n*, 178 Wis. 449, 190 N.W. 101 (1922), the court denied compensation to a coalheaver who suffered a sunstroke stating, "[i]t is urged that physical labor has a tendency to induce sunstroke. No doubt it has, but physical labor is not a hazard peculiar to a coalheaver." *Id.* at 453, 190 N.W. at 102.

345. See, e.g., *Robinette v. Kayo Oil Co.*, 210 Va. 376, 171 S.E.2d 172 (1969). In *Robinette* the employee died from pneumonia contracted as a result of several days' exposure to rain, snow and cold weather on the employer's premises.

346. See *Hughes v. Trustees of St. Patrick's Cathedral*, 245 N.Y. 201, 156 N.E. 665 (1927). In granting compensation to an employee who suffered a heat stroke, the *Hughes* court stated, "[a]lthough the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk." *Id.* at 202-03, 156 N.E. at 665.

347. See 1 A. LARSON, *supra* note 1, §§ 6.40, 8.43.

348. This theory is explained in 1 A. LARSON, *supra* note 1, § 6.50. For courts that use this approach, see *Aetna Life Ins. Co. v. Industrial Comm'n*, 81 Colo. 233, 254 P. 995 (1927) (farm hand struck by lightning); *Harvey v. Caddo De Soto Cotton Oil Co.*, 199 La. 720, 6 So. 2d 747 (1942) (cyclone demolished building and resulted in death of employee); *Gargiulo v. Gargiulo*, 13 N.J. 8, 97 A.2d 593 (1953) (employee struck by arrow fired by child); *Nash-Kelvinator Corp. v. Industrial Comm'n*, 266 Wis. 81, 62 N.W.2d 567 (1954) (employee assaulted by fellow employees for signing peace petition).

349. See 1 A. LARSON, *supra* note 1, § 6.50; note 348 *supra*.

350. 81 Colo. 233, 254 P. 995 (1927).

351. See *id.* at 233-34, 254 P. at 995.

352. *Id.* at 236, 254 P. at 996 (Burke, C.J., concurring specially).

Although the Minnesota court has never adopted the positional-risk approach for injuries resulting from acts of nature,<sup>353</sup> it has applied the theory to certain "street risk" injuries.<sup>354</sup> While the positional-risk theory is attractive because of its simplicity of application, the increased-risk theory strikes a better balance between the humanitarian purposes of the compensation act and the reasonable obligations of the employer. For this reason, it is recommended that the Minnesota Supreme Court retain the increased-risk theory not only in cases involving injuries resulting from acts of nature, but in all other situations not involving a street risk.

### *B. Stepping Aside from Regular Duties to Assist Others*

Although an act outside an employee's regular duties that is undertaken in good faith to enhance the employer's interests is usually within the course of employment,<sup>355</sup> some injuries sustained after an employee steps aside from regular duties to assist others may not be compensable.<sup>356</sup> These situations may be conveniently grouped into three categories. In the first category, the employee sustains an injury while stepping aside pursuant to some type of command to assist others.<sup>357</sup> In the second category, the employee is injured while stepping aside from the regular employment to assist others without any direction from the employer.<sup>358</sup> In the third category, the employee sustains injuries while attempting to rescue others.<sup>359</sup> Each of these situations is examined below.

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353. See K. Kirwin, *Cases and Materials on Minnesota Workers' Compensation* 207-08 (1980) (course material on reserve in William Mitchell College of Law Library).

354. See *Bookman v. Lyle Culvert & Road Equip. Co.*, 153 Minn. 479, 190 N.W. 984 (1922).

355. *Swenson v. Zacher*, 264 Minn. 203, 118 N.W.2d 786 (1962), in which the court, quoting from Professor Larson's treatise stated, "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." *Id.* at 211, 118 N.W.2d at 791.

356. See, e.g., *Stepan v. J.C. Campbell Co.*, 228 Minn. 74, 36 N.W.2d 401 (1949) (employee held to be outside course of employment when injured on off hours assisting coemployee putting up ceiling in employer's temporary shack); *Ridler v. Sears, Roebuck & Co.*, 224 Minn. 256, 28 N.W.2d 859 (1947) (employee held to be outside scope of employment when injured voluntarily assisting third person to unload truck).

357. The compensability of such injuries is discussed in 1A A. LARSON, *supra* note 1, § 27.40 (1979).

358. The compensability of such injuries is discussed in 1A A. LARSON, *supra* note 1, § 27.40 (1979).

359. The compensability of such injuries is discussed in 1A A. LARSON, *supra* note 1, §§ 28.00-.32 (1979); W. SCHNEIDER, *supra* note 1, §§ 1650-1656.

### 1. *Stepping Aside by Direction*

In *O'Rourke v. Percy Vittum Co.*,<sup>360</sup> the Minnesota court determined that an employee fatally injured while assisting his supervisor on the supervisor's personal farm sustained a compensable injury even though the farm was not operated as a part of the employer's business.<sup>361</sup> The court emphasized that the employee did not have any knowledge or reason to believe that the farm was not being operated as a part of the employer's business.<sup>362</sup> By way of limitation, however, the court noted that if the employee undertook the work resulting in his death merely as an accommodation to his supervisor personally, his employer would not be liable.<sup>363</sup> Implicit in the court's reasoning is the caveat that if an employee's "supervisor" is a lower level manager whose authority to give an order might be questioned, the activity may not be within the employee's course of employment.<sup>364</sup> This is inconsistent with the position in Professor Larson's treatise<sup>365</sup> and the general rule in other jurisdictions—when an employee is ordered by any supervisor to act outside the course of his normal duties for the private benefit of the supervisor, the activity, no matter how remote, is compensable.<sup>366</sup> This approach is preferable because it avoids placing the employee in the dilemma of following orders and losing compensation or refusing orders and losing his job.<sup>367</sup>

### 2. *Stepping Aside Without Direction*

In *Ramczik v. Winona Machine & Foundry Co.*,<sup>368</sup> the employee had

360. 166 Minn. 251, 207 N.W. 636 (1926).

361. *Id.* at 256-57, 207 N.W. at 638.

362. *Id.* at 256, 207 N.W. at 638.

363. *See id.* at 257, 207 N.W. at 638.

364. Such reasoning would be consistent with cases that have refused to impose liability upon an employer for injuries sustained by an employee who was complying with an order given by one, who in effect, was only a coemployee. *See Carnahan v. Mailometer Co.*, 201 Mich. 153, 167 N.W. 9 (1918) (employee ordered by shipping clerk to deliver box of books).

365. *See* 1A A. LARSON, *supra* note 1, § 27.40 (1979).

366. *See* *Collins' Dependent's Case*, 342 Mass. 389, 173 N.E.2d 641 (1961); *Nichols v. Davidson Hotel Co.*, 333 S.W.2d 536 (Mo. App. 1960); *Arrington v. Murray*, 182 Va. 1, 28 S.E.2d 19 (1943).

The *Nichols* court commented that "In our industrial society we may take judicial notice that corporate employees who fail to take 'suggestions' made by corporate officers are apt to become ex-employees." 333 S.W.2d at 543.

367. *See* *Nichols v. Davidson Hotel Co.*, 333 S.W.2d 536 (Mo. App. 1960); *Arrington v. Murray*, 182 Va. 1, 28 S.E.2d 19 (1943); 1A A. LARSON, *supra* note 1, § 27.40 (1979).

368. 174 Minn. 156, 218 N.W. 545 (1928).

gone onto his employer's premises to get a drink of water after his regular hours of work.<sup>369</sup> While on the premises he was requested by three co-workers to help them lift a heavy iron form.<sup>370</sup> In assisting his co-workers, the employee sustained a serious injury.<sup>371</sup> The employer argued that the injury did not arise out of and in the course of employment because the employer never requested the employee to assist in lifting the iron form.<sup>372</sup> The *Ramczik* court correctly rejected this argument because the work being performed was in furtherance of the employer's business.<sup>373</sup> Implicit in the *Ramczik* court's holding is the recognition that it would be contrary to the employer's best interests to forbid employees to assist one another just because the assistance is technically not within the scope of one employee's present duties.<sup>374</sup> Thus, an employee who in good faith attempts to further his employer's interests by some act outside his fixed duties is normally held to be within the course and scope of employment if an injury occurs while assisting a coemployee.<sup>375</sup>

The employer, however, must be allowed some authority to keep employees within their respective employment spheres.<sup>376</sup> The Minnesota Supreme Court recognized this right in *Stepan v. J.C. Campbell Co.*<sup>377</sup> In *Stepan* the employee was injured while assisting

369. *Id.* at 157, 218 N.W. at 545.

370. *Id.*

371. *Id.* at 156, 218 N.W. at 545.

372. *See id.* at 157, 218 N.W. at 545.

373. *Id.* at 157-58, 218 N.W. at 545-46. The *Ramczik* case is consistent with the general rule that an activity undertaken in good faith by an employee to assist a coemployee in the latter's performance of his work is compensable. *See* 1A A. LARSON, *supra* note 1, § 27.11 (1979). For other cases that apply this rule, see *Stoddard v. Industrial Comm'n*, 23 Ariz. App. 235, 532 P.2d 177 (1975); *Scott v. Pacific Coast Borax Co.*, 140 Cal. App. 2d 173, 294 P.2d 1039 (1956); *Groves v. Marvel*, 213 A.2d 853 (Del. 1965); *B.F. Gump Co. v. Industrial Comm'n*, 411 Ill. 196, 103 N.E.2d 504 (1952); *Laird v. Springer*, 31 A.D.2d 682, 295 N.Y.S.2d 872 (1968); *Maher v. Hallmark Cards, Inc.*, 207 Pa. Super. 472, 218 A.2d 593 (1966).

374. In commenting on the *Ramczik* case, Professor Larson states, "The reason for this holding is simple: it would be contrary not only to human nature but to the employer's best interests to forbid employees to help each other on pain of losing compensation benefits for any injuries thereby sustained." 1A A. LARSON, *supra* note 1, § 27.12 (1979).

375. *See* cases cited note 373 *supra*.

376. Recognizing this need, Professor Larson comments:

Of course, it would be going too far to say that every act which benefits the employer is in the course of employment. The employer must be conceded some right to keep the employees within their respective spheres. He could hardly run a factory with the employees playing musical chairs with their jobs.

1A A. LARSON, *supra* note 1, § 27.13 (1979).

377. 228 Minn. 74, 36 N.W.2d 401 (1949).

a fellow employee in putting up a ceiling in a temporary shack at a lumber camp.<sup>378</sup> The injured employee was never requested by his supervisor to assist in improving his friend's shack and the injury occurred during non-working hours.<sup>379</sup> Under these circumstances, a finding that the employee's injuries did not arise out of and in the course of employment was properly sustained, even though the activity was in furtherance of the employer's interests.<sup>380</sup>

### 3. Rescue Doctrine

#### a. Rescue for Benefit of Employer

As a general rule, any rescue activity resulting in injury to an employee will be within the course of employment if the employer is benefited by the rescue.<sup>381</sup> Included within this general rule is the recognition that any injury an employee sustains in an effort to save himself in emergencies, whether real<sup>382</sup> or apparent,<sup>383</sup> is compensable.

There is little dispute that injuries sustained during emergency efforts to save the employer's property from theft,<sup>384</sup> fire,<sup>385</sup> or other hazards<sup>386</sup> also are within the course of employment. More-

378. *Id.* at 76, 36 N.W.2d at 402.

379. *Id.*

380. *Id.* at 77, 36 N.W.2d at 403. The result in *Stepan* is consistent with the holdings in *Bivens v. Marshall R. Young Drilling Co.*, 251 Miss. 264, 169 So. 2d 446 (1964) (employee denied compensation for injuries sustained when requested by immediate superior, who had no authority to ask employee to leave his post, to depart on a squirrel-hunting trip); *Foster v. Mallory S.S. Co.*, 244 N.Y. 612, 155 N.E. 919 (1927) (widow denied compensation for death of employee who was struck by automobile while delivering pay envelope to fellow employee); *Hinton Laundry Co. v. De Lozier*, 143 Tenn. 399, 225 S.W. 1037 (1920) (laundry employee not entitled to compensation for injury received while pressing clothes as favor to fellow employee after working hours and in violation of company rule); *Olson Rug Co. v. Industrial Comm'n*, 215 Wis. 344, 254 N.W. 519 (1934) (foreman of crew of traveling salesmen denied compensation for injury resulting from car accident that occurred while taking an ill crew member to his parents' home).

381. *See* 1A A. LARSON, *supra* note 1, § 28.00 (1979).

382. *See id.* § 28.11.

383. *Globe Indem. Co. v. Legien*, 47 Ga. App. 539, 171 S.E. 185 (1933) (employee injured while attempting to evade dog he thought to be vicious).

384. *See* *Martinez v. Workers' Compensation Appeals Bd.*, 15 Cal. 3d 982, 544 P.2d 1350, 127 Cal. Rptr. 150 (1976); *Johnson v. Chicago & N.W. Ry.*, 69 S.D. 111, 7 N.W.2d 145 (1942).

385. *See* *Stresenreuter v. Industrial Comm'n*, 322 Ill. 187, 152 N.E. 548 (1926); *Andrews v. Emporium Forestry Co.*, 250 N.Y. 592, 166 N.E. 336 (1929) (*per curiam*); *Associated Employer's Reciprocal v. State Indus. Comm'n*, 82 Okla. 229, 200 P. 174 (1921).

386. *McCue v. Industrial Comm'n*, 5 Ariz. App. 194, 424 P.2d 842 (1967) (bank guard

over, even if the rescue takes place during non-working hours, compensation will be awarded because the employer's interests are being served.<sup>387</sup> Compensation also is clearly proper for injuries an employee sustains while rescuing coemployees because the injured employee is merely complying with the employer's duty to aid employees in danger.<sup>388</sup> The more difficult question of the compensability of injuries sustained while rescuing strangers is explored below.<sup>389</sup>

### b. *Rescue of Strangers*

Although not frequently encountered, one of the more controversial issues in workers' compensation law is whether injuries incurred in the rescue of strangers should be compensable.<sup>390</sup> Although injuries sustained by employees who attempt to rescue strangers threatened by dangers from beyond the employment environment might, at first, seem to lack a sufficient employment connection, they often are found to be covered by the compensation act because rescue cases have a humanitarian appeal.<sup>391</sup> The case most frequently cited and relied on by claimants is the United States Supreme Court decision, *O'Leary v. Brown-Pacific-Maxon, Inc.*<sup>392</sup> In *O'Leary* the employer was a government contractor on the island of Guam.<sup>393</sup> The contractor maintained a recreation center for its employees near a channel on the shoreline. The channel created such a danger for swimmers that its use was for-

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struck by car when investigating accident near bank); *Sebo v. Libby, McNeil & Libby*, 216 Mich. 351, 185 N.W. 702 (1921) (employee injured stopping runaway horses); *Baum v. Industrial Comm'n*, 288 Ill. 516, 123 N.E. 625 (1919) (protecting employer's property from destruction by strikers).

387. See *Meaney v. Keating*, 200 Misc. 308, 102 N.Y.S.2d 514 (1951) (employee injured during middle of night while fighting fire at employer's factory); *Andrews v. Emporium Forestry Co.*, 250 N.Y. 592, 166 N.E. 336 (1929) (*per curiam*) (employee suffered heart attack while running to put out fire in building owned by employer); 1A A. LARSON, *supra* note 1, § 28.11 (1979).

388. See, e.g., *United States Fidelity & Guar. Co. v. Industrial Accident Comm'n*, 174 Cal. 616, 163 P. 1013 (1917); *Brock-Haffner Press Co. v. Industrial Comm'n*, 68 Colo. 291, 187 P. 44 (1920); *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N.E. 999 (1915); *Adams v. Bryant*, 274 S.W.2d 791 (Ky. 1955).

389. See notes 390-415 *infra* and accompanying text.

390. See 1A A. LARSON, *supra* note 1, § 28.21 (1979).

391. Davis, *Workmen's Compensation in Connecticut—The Necessary Work Connection*, 7 CONN. L. REV. 199, 210 (1975).

392. 340 U.S. 504 (1951).

393. *Id.* at 505.

bidden and warning signs were posted.<sup>394</sup> The employee was waiting for a bus at the center when he noticed two men standing on the reefs beyond the channel motioning for help.<sup>395</sup> He jumped into the water in an attempt to rescue the men.<sup>396</sup> Unfortunately, the employee drowned while trying to swim the channel.<sup>397</sup> In upholding an award under the Longshoremen's and Harbor Workers' Compensation Act,<sup>398</sup> the Court stated:

All that is required is that the "obligations or conditions" of employment create the "zone or special danger" out of which the injury arose. A reasonable rescue attempt, like pursuit in aid of an officer making an arrest, may be "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute."<sup>399</sup>

Professor Larson correctly characterizes the *O'Leary* case as falling within the positional-risk doctrine because the Court indicated that "[t]he test of recovery is not a causal relation between the nature of employment of the injured person and the accident."<sup>400</sup> Finding a work connection merely because the employment brings the employee to the place where a moral obligation to rescue a stranger is encountered, however, is apparently inconsistent with Minnesota law. For example, in *Weidenbach v. Miller*,<sup>401</sup> the employee, a truck driver, accompanied by his employer, was driving along a lake when they observed a man who had fallen through the ice.<sup>402</sup> The employer indicated that they should investigate.<sup>403</sup>

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. 33 U.S.C. §§ 901-941, 944-950 (1976 & Supp. II 1978).

399. 340 U.S. at 507 (citations omitted).

400. 1A A. LARSON, *supra* note 1, § 28.23, at 5-340 (1979) ("The *Brown-Pacific-Maxon* case adopts the positional risk theory in its present form, by finding work-connection if the employment merely brings the employee to the place where he encounters a moral obligation to rescue a stranger."). Professor Riesenfeld views the *O'Leary* case in a different light. He characterizes *O'Leary* as falling within the "twilight zone in which the expert judgment of the administrative agency" is controlling. Riesenfeld, *supra* note 1, at 544.

401. 237 Minn. 278, 55 N.W.2d 289 (1952).

402. *See id.* at 279, 55 N.W.2d at 289.

403. The testimony of the employer at the compensation hearing was as follows:

Q. And what were those men doing?

A. Well, there wasn't two men, only one that we saw.

Q. One man. What was the one man doing?

A. He was floundering in the water and hollering for help.

Q. What did you do?

A. Well, we stopped the truck and—that is, Earl [the employee] stopped the truck, he was driving, and run over to where the accident was.

The employee immediately stopped the truck and ran out onto the frozen lake.<sup>404</sup> During the rescue attempt the ice gave way and the employee drowned.<sup>405</sup> Although the court cited numerous cases that allowed compensation in analogous situations,<sup>406</sup> it ultimately denied compensation. In doing so, it framed the issue as follows: "Can it be said that assistance to any person observed to be in peril off the highway, regardless of the distance separating such person from the highway is incidental to the employment so long as such person is in the range of the employee's vision?"<sup>407</sup> Answering this question in the negative, the court denied compensation.<sup>408</sup> As to the argument that the employer enlarged the employment scope by ordering the employee to stop, the court stated that there was no express direction to go to the aid of a stranger; at best, the employer inquired of the employee whether they should not do so.<sup>409</sup>

The *Weidenbach* decision, however, may have been impliedly

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Q. Did you make any statement to Earl before he stopped the truck?

A. My recollection—I don't remember the exact words but the sum and substance was, I said: "There is a man in the lake," and I believe that I—I am not positive now, it has been a long time; seems to me I said, "We better stop."

Q. "Better stop"?

A. There might be a possibility—I don't remember whether I said that or not.

*Id.* at 279-80, 55 N.W. at 290.

404. *Id.*

405. *Id.*

406. *See id.* at 284-90, 55 N.W.2d at 292-96.

407. *Id.* at 291, 55 N.W.2d at 296.

408. *Id.* at 293, 55 N.W.2d at 297.

409. *Id.* The Minnesota court's reasoning in this regard was correct. Because of an ever-present "[r]eluctance to countenance 'nonfeasance' as a basis of liability, the law [in America] has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being [whose life] is in danger." W. PROSSER, *supra* note 3, § 56, at 340. In contrast to the indifference of American law, at least 13 European countries have specific provisions in their criminal codes imposing a duty of rescue on individuals able to assist the less fortunate. *See* Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in *THE GOOD SAMARITAN AND THE LAW* 91-92 (J. Ratcliffe ed. 1966).

Interestingly, Vermont is the only state that imposes a general duty to rescue. The Vermont statute reads in relevant part as follows:

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless the assistance or care is being provided by others.

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$100.00.

VT. STAT. ANN. tit. 12, § 519 (1973). For a discussion of the Vermont statute, see Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

overruled in 1974 by *Carey v. Stadther*.<sup>410</sup> In *Carey* compensation was awarded to the widow of a feed salesman who died while attempting to help an individual who had been working in a well approximately 100 feet from the coffee shop in which the employee was visiting with area farmers.<sup>411</sup> After being in the hole about fifteen seconds, the employee yelled "I smell something, pull me up."<sup>412</sup> Seconds later, while being hoisted from the hole, the employee collapsed and died from asphyxiation. In indicating that the death arose out of and in the course of employment, the court framed the crucial issue as follows: "Was Carey's act in going to the aid of a man lying at the bottom of a well the type of conduct encouraged by his employer? The record unequivocally shows that the company actually encouraged its salesman to represent the company by being helpful."<sup>413</sup>

By framing the question in this fashion, the court was able to award compensation.<sup>414</sup> Although the claimant clearly died in a brave act of selfless service to humanity, workers' compensation benefits should not be given in lieu of medals. To surmise that Carey rendered assistance only because of his employment training implies that absent that training he would have stood idly by and let the stranger perish, a supposition that gives little credit to Carey's character and bravery. A better approach in *Carey* would have been to find an implied contract of hire between Carey and the employer of the well diggers as it was this employer that benefitted from Carey's acts.<sup>415</sup>

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410. 300 Minn. 88, 219 N.W.2d 76 (1974).

411. *Id.* at 90, 219 N.W.2d at 77.

412. *Id.*

413. *Id.* at 93, 219 N.W.2d at 79.

414. *See id.* at 96, 219 N.W.2d at 80. The court found persuasive the claimant's arguments that the employee would be a more successful salesman if he used the sales "technique" of being friendly and being of service to potential customers. *See id.* at 89, 219 N.W.2d at 77.

415. Such a result finds support in *State ex rel. Nienaber v. District Court*, 138 Minn. 416, 165 N.W. 268 (1917). In that case, the employee of a coal delivery company requested the claimant to assist him in pushing his wagon out of an area where it was mired in mud. While pushing the wagon, the claimant was injured. The court held that the claimant was entitled to compensation because "the driver of the coal wagon was engaged in the discharge of the duties of his employment, was confronted with an emergency, relief from which required assistance, and was within his implied authority in employing plaintiff to render the necessary help." *Id.* at 417, 165 N.W. at 268 (emphasis added).

### C. Recreational Activities and Employer-Sponsored Social Events

One of the fringe benefits provided by employers is the sponsoring, encouraging, or permitting of recreational and social activities.<sup>416</sup> These activities may vary from holding a company picnic during normal working hours,<sup>417</sup> to sponsoring employee's softball teams.<sup>418</sup> The developing law in this area can be separated into two categories: recreational activities<sup>419</sup> and employer-sponsored social events.<sup>420</sup>

#### I. Recreational Activities

An examination of the cases dealing with recreational activities indicates a lack of uniformity in the decisions,<sup>421</sup> usually resulting

416. Professor Larson notes that "[a] comparatively recent development in the 'employment environment' is the widespread and increasing prevalence of recreational activities sponsored, encouraged or permitted in varying degrees by employers." 1A A. LARSON, *supra* note 1, § 22.00, at 5-71 (1979).

417. See *Tietz v. Hastings Lumber Mart, Inc.*, 297 Minn. 230, 210 N.W.2d 236 (1973). In *Tietz* an employee drowned at a company picnic. Because full attendance was encouraged and the picnic was held during normal working hours, the court granted compensation. *Tietz* should be contrasted with *Ethen v. Franklin Mfg. Co.*, 286 Minn. 371, 176 N.W.2d 72 (1970), in which compensation was denied to an employee injured at a company picnic during non-working hours with attendance voluntary.

418. See *LeBar v. Ewald Bros. Dairy*, 217 Minn. 16, 13 N.W.2d 729 (1944); cf. *Columbia Gas of Ohio, Inc. v. Sommer*, 44 Ohio App. 2d 69, 335 N.E.2d 743 (1974) (employer-sponsored basketball).

419. For a general discussion of the compensability of recreational activities, see 1A A. LARSON, *supra* note 1, §§ 22.00-30 (1979); 6 W. SCHNEIDER, *supra* note 1, §§ 1594-1595; Schneider, *Compensability of Injuries During Employer-Sponsored Recreational Events*, 2 NAT'L A. CLAIMANT'S COMPENSATION ATTORNEYS L.J. 62 (1948); Note, *Recreational Injuries: Infusion of Common Law, Agency-Tort Concepts*, 34 IND. L.J. 310 (1959); Note, *Injury from Recreational Activities as Arising out of the Course of Employment*, 28 MINN. L. REV. 414 (1944); Note, *Recovery for Recreational Injuries*, 25 N.Y.U. L. REV. 149 (1950); Note, *Recreational Injuries*, 24 TENN. L. REV. 870 (1957); Note, *Workmen's Compensation for Injuries Arising out of Recreational Activity*, 1951 WASH. U.L.Q. 87.

420. For a general discussion of the compensability of employer-sponsored social events, see 1A A. LARSON, *supra* note 1, § 22.21 (1979); 7 W. SCHNEIDER, *supra* note 1, § 1666.

421. Compare *Federal Mut. Liab. Ins. Co. v. Industrial Accident Comm'n*, 90 Cal. App. 357, 265 P. 858 (1928) (awarding compensation) and *Jewel Tea Co. v. Industrial Comm'n*, 6 Ill. 2d 304, 128 N.E.2d 699 (1955) (same) and *LeBar v. Ewald Bros. Dairy*, 217 Minn. 16, 13 N.W.2d 729 (1944) (same) and *Complitano v. Steel & Alloy Tank Co.*, 34 N.J. 300, 168 A.2d 809 (1961) (same) and *Columbia Gas of Ohio, Inc. v. Sommer*, 44 Ohio App. 2d 69, 335 N.E.2d 743 (1974) (same) with *Lindsay v. Public Serv. Co.*, 146 Colo. 579, 362 P.2d 407 (1961) (denying compensation) and *Keystone Steel & Wire Co. v. Industrial Comm'n*, 40 Ill. 2d 160, 238 N.E.2d 593 (1968) (same) and *McDonald v. St. Paul Fire & Marine Ins. Co.*, 288 Minn. 452, 183 N.W.2d 276 (1970) (same) and *Youngberg v. Donlin Co.*, 264 Minn. 421, 119 N.W.2d 746 (1963) and *Biggs v. Presto Lite Div. of Eltra Corp.*, 462 P.2d 641 (Okla. 1969) (same).

from the different "mix" in the fact situations.<sup>422</sup> The leading Minnesota case awarding compensation for a recreational injury is *Le Bar v. Ewald Brothers Dairy*.<sup>423</sup> In *Le Bar* an employee sustained an injury while playing for a company-sponsored softball team in a commercial league.<sup>424</sup> The court concluded from the manner in which the employer had supported employee sporting activities that the employer considered the athletic contests an essential part of its business.<sup>425</sup> The *Le Bar* court also indicated that compensation was appropriate because there was evidence of significant advertising and public relations value to the employer, as well as employer sponsorship.<sup>426</sup>

The *Le Bar* court's rather liberal interpretation of the requirement that an employer benefit from the recreational activity, however, must be read in conjunction with dictum in the 1963 Minnesota decision, *Youngberg v. Donlin Co.*<sup>427</sup> In *Youngberg* the court indicated that the benefit the employer receives from the employee's attendance at the recreational activity must be something "beyond the intangible value of improvement in the employee's health or morale that is common to all kinds of recreation and social life."<sup>428</sup>

In its most recent decision involving employer-sponsored recreation activities, the Minnesota court indicated that four factors would be considered in determining whether compensation was appropriate:<sup>429</sup> whether the activity took place on or off the em-

422. *McDonald v. St. Paul Fire & Marine Ins. Co.*, 288 Minn. 452, 454, 183 N.W.2d 276, 277 (1970); 1A A. LARSON, *supra* note 1, § 22.24 (1979).

423. 217 Minn. 16, 13 N.W.2d 729 (1944).

424. *Id.* at 17-18, 13 N.W.2d at 729.

425. *Id.* at 20, 13 N.W.2d at 730.

426. *See id.* at 18-20, 13 N.W.2d at 730.

427. 264 Minn. 421, 119 N.W.2d 746 (1963).

428. *Id.* at 427, 119 N.W.2d at 750. In *Youngberg* the court denied compensation for an injury suffered in the course of a return trip from a company-sponsored bowling event. The claimant's argument that the "decendent was returning from the performance of a work-related, recreational activity which was in the nature of a special errand or mission requested by his employer" was also unsuccessful. *Id.* at 424-26, 119 N.W.2d at 748-49.

429. *See McDonald v. St. Paul Fire & Marine Ins. Co.*, 288 Minn. 452, 183 N.W.2d 276 (1970). In *McDonald* the claimant was injured in a softball game sponsored by the Clock and Globe Club, a social association of fellow employees. Although the employer reserved the right to restrict activities of this association that were detrimental to the company, and the funds for the operation of the association came from the profits made from the employer's vending machines, the court denied compensation. In so doing, the court emphasized that the employee's injury took place off the premises, after working hours, and with insufficient employer control. *Id.* at 455-56, 183 N.W.2d at 278.

ployer's premises during working hours;<sup>430</sup> the degree of employer initiative and control of the activity;<sup>431</sup> the amount of employer contribution of money or equipment<sup>432</sup> and, the quantity and type of employer benefit derived from the activity.<sup>433</sup> These factors, properly analyzed and weighted, should allow courts and practitioners to determine with little difficulty when an employee has sustained a compensable injury during an employer-sponsored recreational event.

## 2. Employer-Sponsored Social Events

The law with respect to company-sponsored social events also has not been uniformly applied.<sup>434</sup> The reason for the varying results is again attributable to the different "mix" in each fact situation.<sup>435</sup> The Minnesota Supreme Court was not confronted with a case involving an injury occurring during an employer-sponsored social event until 1970 when it considered *Ethen v. Franklin Manufacturing Co.*<sup>436</sup> In *Ethen* the employee was requested by his foreman to take part in a tug-of-war at a company-sponsored picnic.<sup>437</sup> For some reason, the tug-of-war was cancelled, but the employee attended the picnic anyway.<sup>438</sup> The employee met his foreman, at the foreman's request, at a bridge where the foreman was directing traffic.<sup>439</sup> Finding that the foreman did not need assistance, the

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430. *See id.* at 454, 183 N.W.2d at 277.

431. *See id.*

432. *See id.*

433. *See id.*

434. Compare *Tietz v. Hastings Lumber Mart, Inc.*, 297 Minn. 230, 210 N.W.2d 236 (1973) (benefits awarded to employee's dependents after he drowned at company-sponsored picnic held on weekday during normal working hours) and *Ricciardi v. Damar Prods. Co.*, 45 N.J. 54, 211 A.2d 347 (1965) (compensation awarded to an employee's dependents after he drowned at company-sponsored picnic held on non-work day; no required attendance) with *Ethen v. Franklin Mfg. Co.*, 286 Minn. 371, 176 N.W.2d 72 (1970) (benefits denied to an employee injured at company picnic) and *Dapp v. New York State Liquor Auth.*, 50 A.D.2d 250, 377 N.Y.S.2d 677 (1975) (same).

435. Professor Larson has noted that:

As to company-sponsored picnics, with which may be included various other kinds of outings such as business meetings held at country or lake houses, awards banquets, dinner dances, "fun weekends," and golf outings, there are a number of cases awarding and denying compensation, but, except perhaps as to a few earlier cases, this reflects more a difference in the strength of the fact situation presented than a difference in the tests and rules being applied.

1A A. LARSON, *supra* note 1, § 22.23 (1979) (footnotes omitted).

436. 286 Minn. 371, 176 N.W.2d 72 (1970).

437. *Id.* at 372, 176 N.W.2d at 73.

438. *See id.*

439. *See id.*

employee started back to another part of the picnic area to socialize.<sup>440</sup> To shorten his trip, the employee jumped on a running board of a company truck as it passed him.<sup>441</sup> In so doing, the employee fell off the truck and sustained serious injuries.<sup>442</sup> The employer financed the cost of the picnic; the picnic was on a non-working day for most employees; the employees for whom it was a working day remained at work and did not attend the picnic; no wages were paid; and, attendance was voluntary.<sup>443</sup> In holding that the injury did not arise out of and in the course of the employee's employment, the *Ethen* court concluded that the employer "did not derive a substantial direct benefit from the employees' attendance at the picnic beyond the intangible value of improvement in the employee's health and morale that is common in all kinds of recreation and social life."<sup>444</sup>

Subsequently, in *Tietz v. Hastings Lumber Mart, Inc.*,<sup>445</sup> the Minnesota Supreme Court was presented with a similar fact situation, except that the employees' attendance was mandatory and those employees that did not attend the picnic received a reduction in wages. Because of this factual difference, the court correctly awarded compensation.<sup>446</sup> The court indicated that six factors should be considered in determining whether injuries sustained during an employer-sponsored social event are compensable.<sup>447</sup> First, did the employer sponsor the event?<sup>448</sup> Second, to what extent was attendance voluntary?<sup>449</sup> Third, was there some degree of

440. *See id.*

441. *See id.*

442. *See id.* at 372-73, 176 N.W.2d at 73.

443. *See id.*

444. *Id.* at 374, 176 N.W.2d at 74 (quoting *Youngberg v. Donlin Co.*, 264 Minn. 421, 427, 119 N.W.2d 746, 750 (1963)).

445. 297 Minn. 230, 231, 210 N.W.2d 236, 237 (1973).

446. *See id.* at 232, 210 N.W.2d at 237. Courts in other jurisdictions have awarded compensation when faced with similar facts. *See, e.g.*, *Lybrand, Ross Bros. & Montgomery v. Industrial Comm'n*, 36 Ill. 2d 410, 223 N.E.2d 150 (1967); *Noble v. Zimmerman*, 237 Ind. 556, 146 N.E.2d 828 (1957); *Sica v. Retail Credit Co.*, 245 Md. 606, 227 A.2d 33 (1967); *Kelly v. Hackensack Water Co.*, 23 N.J. Super. 88, 92 A.2d 506 (1952).

447. The *Tietz* court stated, "We have weighed the factors which we regard governing." *Tietz v. Hastings Lumber Mart, Inc.*, 297 Minn. 230, 232, 210 N.W.2d 236, 237 (1973) (footnote omitted). In so doing, the court cited to Professor Larson's treatise, *see* 1A A. LARSON, *supra* note 1, § 22.23 (1979), which indicates that six factors must be considered in determining whether injuries received at company-sponsored social events are compensable.

448. *Tietz v. Hastings Lumber Mart, Inc.*, 297 Minn. at 232, 210 N.W.2d at 237.

449. *Id.*

encouragement to attend, such as taking a record of attendance, or paying for time spent at the social event?<sup>450</sup> Fourth, did the employer finance the occasion to a substantial extent?<sup>451</sup> Fifth, did the employees regard it as an employment benefit to which they were entitled as of right?<sup>452</sup> Finally, did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?<sup>453</sup>

Based on the aforementioned factors, the court denied compensation in two cases in which employees sustained injuries in automobile accidents while driving to their employer's Christmas parties.<sup>454</sup> In *Dahmen v. River Towers Corp.*,<sup>455</sup> however, the court appears to have deviated from its prior well-reasoned decisions in this area. In *Dahmen* the court affirmed an award of compensation when the employee's supervisor told the employee not to take a taxi cab home from an on-premises Christmas party held during working hours, but to ride home with a coemployee selected by the supervisor.<sup>456</sup> The employee sustained an injury when she slipped

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *See Pasko v. Beecher Co.*, 301 Minn. 61, 221 N.W.2d 127 (1974) (per curiam); *Ramaker v. Marjae, Inc.*, 301 Minn. 58, 221 N.W.2d 125 (1974) (per curiam).

*Ramaker* involved a minor who was a part-time busboy at a restaurant that the employer closed early so employees could attend a Christmas party. At that party, the employer furnished all the food and liquor and also gave a short welcoming speech. The minor was injured in an automobile accident that occurred during the ride home. In affirming a denial of benefits, the court stated:

His attendance . . . was neither compulsory nor rewarded by gifts or wages. Further, it appears that the party was scheduled merely for the pleasure of the employees rather than as an incident of the employment relationship or as a benefit to the employer. Any benefit derived by the employer would have to be classified as the intangible improvement of morale, falling far short of meeting the direct and substantial benefit test.

*Id.* at 60, 221 N.W.2d at 127.

In commenting on office Christmas parties in general, Professor Larson indicates: If there is anything more hazardous than the softball game at the first company picnic in spring, it is the Christmas office party. Rivalries and jealousies dormant during the year flare up as co-workers begin to drink and dance together, and compensation law cannot avoid the necessity of deciding whether it covers injuries resulting from contests over who gets what girl or who can drink with whom under the table.

1A A. LARSON, *supra* note 1, § 22.23, at 5-93 (1979) (footnotes omitted).

455. 300 Minn. 514, 218 N.W.2d 702 (1974) (per curiam).

456. *See id.* at 514, 218 N.W.2d at 703.

and fell on the front steps while being assisted to her door.<sup>457</sup> The court indicated that it affirmed the award of compensation because the employer ordered the employee to take a special means of transportation home.<sup>458</sup> The result in *Dahmen* would appear to be in error because the employee would have had to climb the steps of her home even if she had taken a taxi cab home. Neither the employer's Christmas party, nor the "order" to the employee to ride home with a coemployee had anything to do with her injury. Aside from the result in the *Dahmen* case, however, the factors enunciated by the court in *Tietz* provide the necessary assistance to determine which injuries occurring during employer-sponsored social events are compensable.

#### D. Idiopathic Falls

Difficult proof problems for employees arise in idiopathic fall cases. An idiopathic fall is one caused by a purely personal condition, such as a heart attack or an epileptic seizure.<sup>459</sup> When an employee falls at work solely because of an underlying personal condition, and as a result suffers injuries upon contact with the floor, the question presented is whether the injury arises out of the employment.<sup>460</sup> As a general rule, falls on the employer's premises are compensable if the employment places the employee in a position increasing the likelihood or the dangerous effects of a fall,<sup>461</sup> such as on a sharp corner<sup>462</sup> or from a height.<sup>463</sup> The controversial

457. *See id.*

458. *See id.* at 515, 218 N.W.2d at 703.

459. *See generally* 1 A. LARSON, *supra* note 1, § 12.11. Schmidt's *Attorneys' Dictionary of Medicine and Word Finder* defines "idiopathic" as being of "spontaneous origin" or "self-originating." 1 J. SCHMIDT, *ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER* I-4 (1977). A North Carolina court defined an idiopathic fall as "one due to the mental or physical condition of the particular employee." *Cole v. Guilford County*, 131 S.E.2d 308, 311 (N.C. 1963).

460. *See* 1 A. LARSON, *supra* note 1, § 12.11. *See generally* *Stenberg v. Raymond Coop. Creamery*, 209 Minn. 366, 296 N.W. 498 (1941).

461. *See* *Riley v. Oxford Paper Co.*, 149 Me. 418, 420, 103 A.2d 111, 113 (1954); *accord*, *Irby v. Republic Creosoting Co.*, 288 F.2d 195, 198-99 (5th Cir. 1955) (fall from three-foot platform); *Industrial Comm'n v. Nelson*, 127 Ohio St. 41, 42, 186 N.E. 735, 736 (1933) (fall onto base of welding machine); *Corry v. Commissioned Officers' Mess*, 78 R.I. 264, 268, 81 A.2d 689, 692 (1951) (fall from forty-foot terrace).

462. *See* *Kennelly v. Travelers Ins. Co.*, 273 F.2d 479, 481 (5th Cir. 1960) (fall into machinery); *Stasel v. American Radiator & Standard Sanitary Corp.*, 278 S.W.2d 721, 724 (Ky. 1955) (fall onto hot stove).

463. *See* *Baltimore Dry Docks & Ship Bldg. Co. v. Webster*, 139 Md. 616, 617, 116 A. 842, 843 (1922) (fall of 45 feet); *Corry v. Commissioned Officers' Mess*, 78 R.I. 264, 268, 81 A.2d 689, 692 (1951) (fall of 40 feet); *Milwaukee Elec. Ry. & Light Co. v. Industrial*

question is whether an idiopathic fall on a level surface should be viewed as arising out of the employment.<sup>464</sup>

The majority of jurisdictions deny compensation for injuries attributable to idiopathic falls on level surfaces because no special risk or hazard peculiar to the employment exists.<sup>465</sup> *Cinmino's Case*,<sup>466</sup> the first American case involving compensability of an injury or death caused by an idiopathic fall, held that no causal connection was established between the hazard and the injury, because a concrete floor was not a danger created by the employment.<sup>467</sup> Courts that have followed the reasoning in *Cinmino's Case* require a causal connection between the employment injury and special hazard before allowing compensation. Under the majority view, a level floor is not recognized as a hazard or risk of employment because level surfaces are conditions the general public encounters daily whether on a sidewalk or in a home.<sup>468</sup> The majority view rejects the argument that, but for the claimant performing the duties of employment, the injury would never have occurred.<sup>469</sup>

Apparently, the majority view is based on the rationale that extending the Workers' Compensation Act to provide employees with protection against everyday accidents, to which the general public is exposed, would make these employees a "privileged class."<sup>470</sup> Consequently, because injuries from idiopathic falls on

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Comm'n, 212 Wis. 227, 229, 247 N.W. 841, 843-44 (1933) (fall from three or four steps above floor).

464. See 1 A. LARSON, *supra* note 1, § 12.14.

465. See *Sears, Roebuck & Co. v. Industrial Comm'n*, 69 Ariz. 320, 324, 213 P.2d 672, 676 (1950); *Dustin v. Lewis*, 99 N.H. 404, 408, 112 A.2d 54, 57 (1955); *Zuchowski v. United States Rubber Co.*, 102 R.I. 165, 170, 229 A.2d 61, 66 (1967). See generally 1 A. LARSON, *supra* note 1, § 12.14. Indicative of this rule is the statement made in *Howard v. Ford Motor Co.*, 363 S.W.2d 61 (Mo. App. 1962), that:

[n]umerous cases have held as a matter of law that a concrete floor is not such a hazard or special risk for the very simple reason that it is not peculiar to the employment, but is found on most sidewalks, streets and in the flooring of many public and private buildings.

*Id.* at 67.

466. 251 Mass. 158, 146 N.E. 245 (1925).

467. See *id.* at 159, 146 N.E. at 246.

468. See, e.g., *Howard v. Ford Motor Co.*, 363 S.W.2d 61, 67 (Mo. App. 1962); *Zuchowski v. United States Rubber Co.*, 102 R.I. 165, 169, 229 A.2d 61, 66 (1967); *Kraynick v. Industrial Comm'n*, 34 Wis. 2d 107, 110, 148 N.W.2d 668, 671 (1967).

469. See, e.g., *Borden Foods Co. v. Dorsey*, 112 Ga. App. 838, 840, 146 S.E.2d 532, 534 (1965).

470. E.g., *Sears, Roebuck & Co. v. Industrial Comm'n*, 69 Ariz. 320, 323, 213 P.2d 672, 675 (1950).

level surfaces originate basically from a personal risk, and the Workers' Compensation Act is not a general health insurance law requiring compensation for every injury an employee suffers, the majority view rejects any notion that the employee is entitled to compensation for idiopathic falls.<sup>471</sup>

A significant minority of courts, however, have allowed recovery for idiopathic level floor falls,<sup>472</sup> and some notable dissenting opinions have been written in cases that have followed the majority rule.<sup>473</sup> The minority view developed primarily because of the difficulty in distinguishing falls from small heights or falls into objects from falls onto level surfaces.<sup>474</sup> Injuries sustained in falls from heights or into machinery or other objects usually have been compensated because the employment created a special risk.<sup>475</sup> Courts that follow the minority rule view recovery for injuries sustained from an idiopathic fall on a level floor as a logical extension of this rule.<sup>476</sup> At least one commentator has indicated that the current trend is toward compensating employees for these injuries.<sup>477</sup>

In *Stenberg v. Raymond Cooperative Creamery*,<sup>478</sup> the Minnesota Supreme Court was faced with its first case dealing with an idiopathic fall on a level floor. The court held that the employee's injuries arose out of his employment, reasoning that the employment and injury were causally connected.<sup>479</sup> In so holding, the court did not indicate that idiopathic level floor falls were an area of controversy in compensation theory and that the majority of

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471. See, e.g., *Zuchowski v. United States Rubber Co.*, 102 R.I. 165, 169, 229 A.2d 61, 66 (1967).

472. See *Employers Mut. Liab. Ins. Co. v. Industrial Accident Comm'n*, 41 Cal. 2d 676, 679, 263 P.2d 4, 7 (1953) (fall on concrete floor); *Savage v. St. Aeden's Church*, 122 Conn. 343, 345, 189 A. 599, 601 (1937); *Pollock v. Studebaker Corp.*, 97 N.E.2d 63 (Ind. App. 1951); *George v. Great E. Food Prods., Inc.*, 44 N.J. 44, 47, 207 A.2d 161, 163 (1965); 1 A. LARSON, *supra* note 1, § 12.14.

473. See *Henderson v. Celanese Corp.*, 16 N.J. 208, 213, 108 A.2d 267, 271 (1954) (Brennan, J., dissenting), *majority opinion overruled*, *George v. Great E. Food Prods., Inc.*, 44 N.J. 44, 207 A.2d 161 (1965); *Stanfield v. Industrial Comm'n*, 146 Ohio St. 583, 586, 67 N.E.2d 446, 448 (1946) (Bell and Williams, J.J., dissenting).

474. See *Riley v. Oxford Paper Co.*, 149 Me. 418, 422, 103 A.2d 111, 114 (1954). See generally 1 A. LARSON, *supra* note 1, § 12.14.

475. See note 462 *supra*.

476. See, e.g., *George v. Great E. Food Prods., Inc.*, 44 N.J. 44, 46, 207 A.2d 161, 162 (1965). See generally 1 A. LARSON, *supra* note 1, § 12.14.

477. See *Henderson, Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117, 125-26 (1969).

478. 209 Minn. 366, 296 N.W. 498 (1941).

479. See *id.* at 371-72, 296 N.W. at 501.

courts have denied compensation for such injuries. Rather, in an almost nonchalant manner, the *Stenberg* court simply indicated that the injury arose out of the employee's employment.<sup>480</sup> Until recently, Minnesota cases have followed the *Stenberg* court's reasoning without examining the issue in any greater detail.<sup>481</sup> Under *Stenberg* and its progeny, a fall on a level surface appears to be compensable as a matter of law.<sup>482</sup> Fortunately, a 1979 Minnesota decision, *O'Rourke v. North Star Chemicals, Inc.*,<sup>483</sup> may be viewed as ending the *Stenberg* court's simplistic handling of idiopathic falls. In *O'Rourke* the court, without making any reference to prior idiopathic fall cases, held that the employment must "aggravate the effects of the fall" before the resulting injury is compensable.<sup>484</sup> The *O'Rourke* court's holding, therefore, appears to bring Minnesota within the majority rule regarding idiopathic falls.

#### E. Attending Personal Needs During Working Hours

On several occasions during each working day, employees turn aside briefly from their regular duties to attend to personal needs. As a general rule, employees who engage in acts that minister to their personal comfort may recover compensation when injured, unless the extent of the departure is so great that an attempt to abandon employment may be inferred as a matter of law.<sup>485</sup> The rationale supporting this general rule is that, although personal needs by definition involve personal risks, they are nevertheless incidental to the employment relationship.<sup>486</sup> Based on this rationale, numerous decisions have awarded compensation for injuries occurring while smoking,<sup>487</sup> having lunch,<sup>488</sup> seeking shelter from

480. *See id.* at 372, 296 N.W. at 501.

481. *See* Miller v. Goodhue-Rice-Wabasha Citizens Action Council, Inc., 293 Minn. 454, 455, 197 N.W.2d 424, 424-25 (1972) (per curiam); Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 578-79, 9 N.W.2d 6, 13 (1943).

482. *See* notes 478-81 *supra*.

483. 281 N.W.2d 192 (Minn. 1979).

484. *Id.* at 194.

485. *See* 1A A. LARSON, *supra* note 1, § 21.00 (1979). For a general discussion of the personal comfort doctrine, *see id.* §§ 21.00-.84; 7 W. SCHNEIDER, *supra* note 1, §§ 1617-1631; Comment, *Workmen's Compensation: The Personal Comfort Doctrine*, 1960 WIS. L. REV. 91.

486. *See, e.g.*, Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 415, 158 P.2d 511, 518 (1945); Prater v. Indiana Briquetting Corp., 253 Ind. 83, 88, 251 N.E.2d 810, 812 (1969); Sweet v. Kolosky, 259 Minn. 253, 255, 106 N.W.2d 908, 910 (1960); Olson v. Trinity Lodge No. 282, 226 Minn. 141, 146-47, 32 N.W.2d 255, 258 (1948); Collums v. Caledonia Mfg. Co., 237 Miss. 607, 612, 115 So. 2d 672, 673 (1959).

487. *See, e.g.*, Natco Corp. v. Mallory, 262 Ala. 595, 80 So. 2d 274 (1955); Whiting-

the elements,<sup>489</sup> answering calls of nature,<sup>490</sup> quenching thirst,<sup>491</sup>

Mead Commercial Co. v. Industrial Accident Comm'n, 178 Cal. 505, 173 P. 1105 (1918); Lovallo v. American Brass Co., 112 Conn. 635, 638-39, 153 A. 783, 784 (1931); Haller v. City of Lansing, 195 Mich. 753, 162 N.W. 335 (1917); Kaletha v. Hall Mercantile Co., 157 Minn. 290, 196 N.W. 261 (1923); Wickham v. Glenside Woolen Mills, 252 N.Y. 11, 168 N.E. 446 (1929) (per curiam); State Treasurer v. Ulysses Apartments, Inc., 232 A.D. 393, 250 N.Y.S. 190 (1931); Dzikowska v. Superior Steel Co., 259 Pa. 578, 582-83, 103 A. 351, 352 (1918); Mack v. Branch No. 12, 207 S.C. 258, 265-66, 35 S.E.2d 838, 840-41 (1945).

488. See, e.g., Royall v. Industrial Comm'n, 106 Ariz. 346, 351, 476 P.2d 156, 161 (1970); Lassila v. Sears, Roebuck & Co., 302 Minn. 350, 224 N.W.2d 519 (1974) (per curiam); Krause v. Swartwood, 174 Minn. 147, 149, 218 N.W. 555, 556 (1928).

In *Lassila* the court upheld an award to an employee injured during "an unpaid, unsupervised lunch period in a cafeteria operated by the employer on its premises exclusively for the convenience of its employees," reasoning:

The lunch break, whether compensated or not, is a period of activity instrumental to employment just as a coffeebreak, a visit to the toilet, or a pause for a cigarette. When taken on the employer's premises in an area provided specifically and exclusively for that purpose, it may reasonably be assumed to be of some benefit or advantage to the employer in the operation of his business or the advancement of his interests.

302 Minn. at 350, 224 N.W.2d at 519-20 (footnotes omitted).

489. See, e.g., Naranja Rock Co. v. Dawal Farms, 74 So. 2d 282, 286-87 (Fla. 1954); Ervin v. Industrial Comm'n, 364 Ill. 56, 62-63, 4 N.E.2d 22, 25-26 (1936); Wabash Ry. v. Industrial Comm'n, 360 Ill. 92, 195 N.E. 526 (1935); Allen v. Columbus Mining Co., 207 Ky. 183, 185, 268 S.W. 1073, 1074 (1925); Blue Diamond Coal Co. v. Walters, 287 S.W.2d 921 (Ky. App. 1956); Rogers v. Mengel Co., 189 La. 723, 730, 180 So. 499, 501 (1938); Smith v. Walker, 35 So. 2d 766, 768 (La. App. 1948); Geibig v. Ann Arbor Asphalt Constr. Co., 238 Mich. 560, 562-63, 214 N.W. 90, 91 (1927); McKenzie v. Railway Express Agency, Inc., 205 Minn. 231, 233, 285 N.W. 529, 530 (1939); Gillmore v. Ring Constr. Co., 227 Mo. App. 1217, 1220, 61 S.W.2d 764, 766 (1933); Bubis v. Flockhardt Foundry Co., 119 N.J.L. 136, 194 A. 781 (1937), *aff'd*, 120 N.J.L. 177, 198 A. 851 (1938) (per curiam); Ziolkowski v. American Radiator Co., 247 N.Y. 513, 161 N.E. 164, 224 N.Y.S. 942 (1928) (per curiam); Volz v. Southerland, 200 Tenn. 344, 350, 292 S.W.2d 385, 387-88 (1956); United Employers Cas. Co. v. Barker, 148 S.W.2d 260, 263 (Tex. Civ. App. 1941); Northwestern Iron Co. v. Industrial Comm'n, 160 Wis. 633, 152 N.W. 416 (1915).

490. See, e.g., Employers' Mut. Ins. Co. v. Industrial Comm'n, 76 Colo. 84, 230 P. 394 (1924); Hunter Packing Co. v. Industrial Comm'n, 1 Ill. 2d 99, 104, 115 N.E.2d 236, 239 (1953); Sachleben v. Gjellefald Constr. Co., 228 Iowa 152, 290 N.W. 48 (1940); Haskins' Case, 261 Mass. 436, 437, 158 N.E. 845, 845 (1927); State *ex rel.* Great N. Express Co. v. District Court, 142 Minn. 410, 413, 172 N.W.2d 310, 311 (1919); Equity Mut. Life Ins. Co. v. Kroger Grocery & Baking Co., 238 Mo. App. 4, 15, 175 S.W.2d 153, 159 (1943); Zabriskie v. Erie R.R., 85 N.J.L. 157, 88 A. 824 (1913), *aff'd*, 86 N.J.L. 266, 92 A. 385 (1914); Coulter v. Nassau-Suffolk B & M Corp., 259 A.D. 942, 19 N.Y.S.2d 811 (1940) (per curiam); Welden v. Skinner & Eddy Corp., 103 Wash. 243, 248, 174 P. 452, 453 (1918); Karlslust v. Industrial Comm'n, 243 Wis. 612, 614, 11 N.W.2d 179, 180 (1943).

491. See, e.g., Alabama Concrete Pipe Co. v. Berry, 226 Ala. 204, 206, 146 So. 271, 272 (1933); Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 415, 158 P.2d 511, 518 (1945); Vendome Hotel v. Gibson, 122 Ind. App. 604, 608-10, 105 N.E.2d 906, 910 (1952); Gilliland v. Edgar Zinc Co., 112 Kan. 39, 40-41, 209 P. 658, 659 (1922); St. Alexandre v. Texas Co., 28 So. 2d 385, 388-89 (La. App. 1946); Collums v. Caledonia Mfg. Co., 237 Miss. 607, 611-12, 115 So. 2d 672, 673 (1959); Goetz v. J.D. Carson Co., 357 Mo. 125, 132, 206 S.W.2d 530, 534 (1947); Moldove v. Rosenhein Co., 266 A.D. 931, 43

seeking fresh air,<sup>492</sup> relaxing during work breaks,<sup>493</sup> and even making or answering telephone calls.<sup>494</sup> Although compensation in these cases appears proper, the Minnesota rule, which requires employer acquiescence, needs clarification.<sup>495</sup>

Emphasizing employer approval instead of general custom may result in considerate employers paying compensation and exempting from liability those employers with restrictive rules.<sup>496</sup> Basing compensation on a general custom, instead of the practice of a par-

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N.Y.S.2d 888 (1943) (per curiam); *Menendes v. Dravo Constr. Co.*, 109 Pa. Super. 224, 167 A. 423 (1933); *Bradshaw v. Aronovitch*, 170 Va. 329, 337-38, 196 S.E. 684, 687 (1938); *Shapaka v. State Compensation Comm'r*, 146 W. Va. 319, 323-24, 119 S.E.2d 821, 824 (1961).

492. *See, e.g.*, *F.W. Woolworth Co. v. Industrial Accident Comm'n*, 17 Cal. 2d 634, 637, 111 P.2d 313, 314 (1941); *Sparks Milling Co. v. Industrial Comm'n*, 293 Ill. 350, 356, 127 N.E. 737, 739-40 (1920); *Von Ette's Case*, 223 Mass. 56, 61, 111 N.E. 696, 698 (1916); *Crotty v. Driver Harris Co.*, 49 N.J. Super. 60, 69, 139 A.2d 126, 131-32 (1958); *Daly v. State Ins. Fund*, 284 A.D. 174, 176-77, 130 N.Y.S.2d 440, 442 (1954); *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 328, 38 S.E.2d 97, 99 (1946); *Booker v. State Compensation Comm'r*, 113 W. Va. 657, 169 S.E. 483 (1933).

493. *See, e.g.*, *Broderick Co. v. Flemming*, 116 Ind. App. 668, 681, 65 N.E.2d 257, 262 (1946); *United Employers Cas. Co. v. Barker*, 148 S.W.2d 260, 263 (Tex. Civ. App. 1941).

494. *See, e.g.*, *Kent v. Kent*, 202 Iowa 1044, 1048-49, 208 N.W. 709, 711 (1926); *Cox's Case*, 225 Mass. 220, 222, 114 N.E. 281, 282 (1916); *Adams v. Colonial Colliery Co.*, 104 Pa. Super. 187, 158 A. 183 (1932).

495. For example, in *Callaghan v. Brown*, 218 Minn. 440, 16 N.W.2d 317 (1944), an employee who for 30 years had crossed the street daily to a small cafe for a coffee break was struck by an automobile and killed. In denying compensation, the Minnesota Supreme Court held that his death did not arise out of and in the course of his employment because "[h]e was where he was solely in furtherance of his own personal desires and accommodation." *Id.* at 441, 16 N.W.2d at 318.

Subsequently, in *Sweet v. Kolosky*, 259 Minn. 253, 106 N.W.2d 908 (1960), the court awarded compensation to a supermarket employee who fell on a public street after a coffee break. The court based its decision on the basis that the employee was guaranteed a coffee break in her union contract and the only way she could exercise her right was to leave the market because there were no facilities on the premises for making coffee. *Id.* at 255, 106 N.W.2d at 910. In this way, the *Sweet* court did not have to overrule the *Callaghan* case but was able to distinguish it on the theory that the employee had employer acquiescence in taking a coffee break. *Id.* at 256, 106 N.W.2d at 910-11.

Arguably, the employer in *Callaghan* also acquiesced in his employee's coffee breaks, because such behavior occurred over a 30-year period. Thus, it would appear that the acquiescence needed in Minnesota has to be a contractual one. Such a result is inconsistent with the theoretical underpinnings of the personal comfort doctrine because that doctrine does not depend on the technical terms of an employment contract, but considers and recognizes that a rest break is an incident of employment because it is beneficial to both the employee and employer. *See* 1A A. LARSON, *supra* note 1, §§ 21.00-.84 (1979). For a criticism of the *Callaghan* case, see *Krause v. Western Cas. & Sur. Co.*, 3 Wis. 2d 61, 71, 87 N.W.2d 875, 881 (1958).

496. *See Tiralongo v. Stanley Works*, 104 Conn. 331, 133 A. 98 (1926).

ticular employer, is the preferable standard.<sup>497</sup>

### F. Horseplay

Should employees who sustain horseplay injuries receive compensation? "Horseplay," of course, is a colloquial term used to describe playful and sportive acts that occasionally result in employee injuries.<sup>498</sup> The early American cases denied compensation even to nonparticipating victims of horseplay.<sup>499</sup> This attitude followed rather blindly from the English courts' reasoning that any employee horseplay injury was foreign to the inherent risks of employment.<sup>500</sup> Not until Mr. Justice Cardozo's 1920 opinion in *Leonbruno v. Champlain Silk Mills*,<sup>501</sup> did American courts consistently award compensation to a nonparticipating victim of horseplay.<sup>502</sup>

Although some early twentieth century American courts attempted to avoid the general rule of nonliability in horseplay situations by finding exceptions when the employer had notice,<sup>503</sup> or

497. See Davis, *The Effect of Employer Approval on Workmen's Compensation Decisions—Letting Affected Parties Communicate Standards*, 54 CORNELL L. REV. 97, 102-03 (1968).

498. See, e.g., *McKnight v. Consolidated Concrete Co.*, 279 Ala. 430, 186 So. 2d 144 (1966) (decedent fatally injured while riding on bucket of crane); *Hughes v. Tapley*, 206 Ark. 739, 177 S.W.2d 429 (1944) (employee injured while lighting powder fuse to frighten co-worker); *Derhammer v. Detroit News*, 229 Mich. 658, 202 N.W. 958 (1925) (truckdriver injured in water throwing fight), *overruled*, *Crilly v. Ballou*, 353 Mich. 303, 327, 91 N.W.2d 493, 506 (1958); *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (employee injured in fall off pickup truck). For a general discussion of the horseplay doctrine, see 1A A. LARSON, *supra* note 1, §§ 23.00-23.66 (1979); 1 W. SCHNEIDER, *supra* note 1, §§ 1609-1616; Brown, "Arising out of and in the Course of Employment" in *Workmen's Compensation Laws—Part IV*, 8 WIS. L. REV. 217 (1933); Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311 (1946); 33 CALIF. L. REV. 458 (1945).

499. See, e.g., *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 P. 212 (1916), *overruled*, *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 26 Cal. 2d 286, 294, 158 P.2d 9, 14 (1945); *Payne v. Industrial Comm'n*, 295 Ill. 388, 129 N.E. 122 (1920); *Tarpper v. Weston-Mott Co.*, 200 Mich. 275, 166 N.W. 857 (1918), *overruled*, *Crilly v. Ballou*, 353 Mich. 303, 327, 91 N.W.2d 493, 506 (1958). Interestingly, as late as 1926, the rule denying compensation to horseplay victims was defended by law review commentators. See 14 KY. L.J. 262 (1926), in which the writer, examining a case allowing no recovery for an air hose injury, states, "[t]his case not only seems to be with the weight of authority, but also seems to reach a just result." *Id.* at 263.

500. The English rule is well expressed in *Armitage v. Lancashire & Yorkshire Ry.* [1902] 2 K.B. 178.

501. 229 N.Y. 470, 128 N.E. 711 (1920).

502. See 1A A. LARSON, *supra* note 1, § 23.10, at 5-124 (1979).

503. See *Kokomo Steel & Wire Co. v. Irick*, 80 Ind. App. 610, 612, 141 N.E. 796, 796 (1923); *Stuart v. Kansas City*, 102 Kan. 307, 310, 171 P. 913, 914 (1918); *Glenn v. Reynolds Spring Co.*, 225 Mich. 693, 696-97, 196 N.W. 617, 619-20 (1924).

when the custom of horseplay existed,<sup>504</sup> Justice Cardozo rejected such fictitious thinking and predicated liability on the ground that the employment environment included the natural tendency of employees to indulge in occasional horseplay.<sup>505</sup>

Since Justice Cardozo's opinion, most courts have allowed only "innocent" horseplay victims to recover compensation.<sup>506</sup> Professor Horovitz blames this result on courts throwing "a judicial bone of solace" to the losing employer.<sup>507</sup> Unfortunately, the courts continued to echo the innocent horseplay doctrine, resulting in the establishment of a simple legal formula for deciding horseplay cases.<sup>508</sup> If the claimant was not the aggressor, compensation was permitted.<sup>509</sup> Conversely, all horseplay aggressors were denied compensation.<sup>510</sup>

Courts rationalized the denial of compensation to horseplay aggressors on several grounds. Perhaps the foremost reason was the common precept that one must not profit from a wrong.<sup>511</sup> Additional reasons included the assumption that horseplay aggressors: were not performing employment duties;<sup>512</sup> were not advancing any interest of the employer;<sup>513</sup> and were abandoning their employment.<sup>514</sup> Professor Horovitz correctly characterizes these methods of sustaining the horseplay aggressor defense as "metaphysic[al] and hairline distinctions."<sup>515</sup>

A leading case awarding compensation to an aggressor in a horseplay situation is the 1960 Minnesota Supreme Court decision

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504. See *White v. Kansas City Stockyards Co.*, 104 Kan. 90, 91, 177 P. 522, 522 (1919); *Markell v. Daniel Green Felt Shoe Co.*, 221 N.Y. 493, 116 N.E. 1060, 161 N.Y.S. 1134 (1917); *Anderson & Kerr v. State Indus. Comm'n*, 155 Okla. 137, 7 P.2d 902 (1932). At least two early court decisions predicated liability on an employer's duty to prevent employees from engaging in horseplay. See *Glenn v. Reynolds Spring Co.*, 225 Mich. 693, 196 N.W. 617 (1924); *Phil Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 283, 204 S.W. 152, 161 (1918).

505. See *Leonbruno v. Champlain Silk Mills*, 229 N.Y. at 472, 128 N.E. at 711.

506. See Horovitz, *supra* note 498, at 322-23.

507. See *id.* at 323.

508. See generally 1A A. LARSON, *supra* note 1, § 23.30 (1979).

509. See *id.*

510. See *id.*

511. See Horovitz, *supra* note 498, at 323.

512. See *Stillwagon v. Callan Bros.*, 183 A.D. 141, 145, 170 N.Y.S. 677, 679 (1918).

513. See *Marion County Coal Co. v. Industrial Comm'n*, 292 Ill. 463, 466, 127 N.E. 84, 85 (1920).

514. See *Armour & Co. v. Industrial Comm'n*, 397 Ill. 433, 437, 74 N.E.2d 704, 706 (1947).

515. See Horovitz, *supra* note 498, at 359.

*Cunning v. City of Hopkins*.<sup>516</sup> The court in *Cunning* awarded compensation based on its reasoning in the earlier assault case of *Petro v. Martin Baking Co.*<sup>517</sup> The *Petro* court had awarded compensation to the widow of an employee killed in a work-connected quarrel in which he was the aggressor.<sup>518</sup> The injuries in *Petro* were held to have arisen out of and in the course of employment because the dispute stemmed from the work environment and its associations.<sup>519</sup> Recognizing that the *Petro* decision had eliminated the aggressor defense in assault cases, the *Cunning* court held that an employee's failure to realize the consequences of a foolish act should not bar recovery in a horseplay case.<sup>520</sup> Based on this rationale, compensation was awarded to a college student who injured himself while playfully obstructing the vision of the driver of the truck in which he was riding.<sup>521</sup> Because the transportation was furnished by the employer as an incident of the employment, the court emphasized that the injury arose out of and in the course of the employment.<sup>522</sup>

Whether horseplay cases should be examined as an arising out of or an in the course of question has been the subject of considerable controversy.<sup>523</sup> Professor Larson suggests that it is a mistake to

516. 258 Minn. 306, 103 N.W.2d 876 (1960).

517. 239 Minn. 307, 58 N.W.2d 731 (1953).

518. *See id.* at 314, 58 N.W.2d at 736. The employer and insurer in *Petro* had unsuccessfully contended that "where a man who knows he is suffering from a heart condition and who must know that an assault will be resisted nevertheless initiates such assault, the injuries to him resulting from the assault are 'intentionally self-inflicted.'" *See id.* In rejecting the employer's and insurer's argument, the *Petro* court cited Justice Rutledge's formulation of the work environment concept in *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 15 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940):

[T]he environment includes associations as well as conditions, and . . . associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as their emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. "Old Man River" is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.

*Petro v. Martin Baking Co.*, 239 Minn. at 311, 58 N.W.2d at 734-35.

519. *Petro v. Martin Baking Co.*, 239 Minn. at 311-12, 58 N.W.2d at 734-35.

520. *See Cunning v. City of Hopkins*, 258 Minn. at 317-19, 103 N.W.2d at 884-85.

521. *See id.* at 307-08, 103 N.W.2d at 878.

522. *See id.* at 311, 103 N.W.2d at 880.

523. Compare 1A A. LARSON, *supra* note 1, § 23.61 (1979) (should be treated as an in

assume horseplay is an arising out of question; he treats it as an in the course of problem.<sup>524</sup> The Minnesota Supreme Court, however, apparently views the arising out of question as being determinative.<sup>525</sup> Interestingly, Dean Pound condemns both approaches because an in the course of analysis leads to the common-law analogy of agency, while starting the analysis with the arising out of requirement may lead to proceeding by analogy to provocation.<sup>526</sup> Dean Pound finds this analogy to be inconsistent with compensation theory and suggests a test of serious and willful misconduct to determine horseplay compensability.<sup>527</sup>

In a trilogy of recent compensation decisions, the Minnesota Supreme Court has denied compensation in horseplay situations. On each occasion, the court treated horseplay as an arising out of issue. In *Walsh v. Charles Olson & Sons, Inc.*,<sup>528</sup> the claimant was injured while operating power equipment that he had been instructed not to use.<sup>529</sup> The referee, relying on the *Cunning* decision, awarded benefits because, "[t]he activity was nothing more than pure and simple 'horseplay' by a young, inquisitive and naturally curious boy."<sup>530</sup> The Minnesota Supreme Court, however, rejected this reasoning because the claimant's act could not reasonably have been foreseen by the employer.<sup>531</sup>

Four years after *Walsh*, in *Elfelt v. Red Owl Stores*,<sup>532</sup> an employee, who suffered an amputation after his ring finger became stuck when he jumped up to touch his hand on rafters above the employer's doorway, was denied compensation because "[t]his action took him outside the scope of his employment."<sup>533</sup> Finally, the court affirmed a denial of benefits to a claimant injured "when

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the course of question) *with* *Vitas v. Grace Hosp. Soc'y*, 107 Conn. 512, 141 A. 649 (1928) (should be treated as an arising out of question) and Pound, *Comments on Recent Important Workmen's Compensation Cases*, 14 NAT'L A. CLAIMANTS' COMPENSATION ATTORNEYS L.J. 47, 65 (1954) (should be treated by examining whether employee's conduct constituted serious and willful misconduct).

524. See 1A A. LARSON, *supra* note 1, § 23.61 (1979).

525. See *Kerpen v. Bill Boyer Ford, Inc.*, 305 Minn. 47, 48, 232 N.W.2d 21, 22 (1975); *Cunning v. City of Hopkins*, 258 Minn. 306, 318, 103 N.W.2d 876, 884 (1960).

526. See Pound, *supra* note 523, at 65.

527. See *id.*

528. 285 Minn. 260, 172 N.W.2d 745 (1969).

529. See *id.* at 261, 172 N.W.2d at 747.

530. *Id.* at 262, 172 N.W.2d at 747.

531. See *id.* at 263, 172 N.W.2d at 747-48.

532. 296 Minn. 41, 206 N.W.2d 370 (1973).

533. *Id.* at 42, 206 N.W.2d at 371.

he submitted to a massage of his back by a fellow employee,<sup>534</sup> in *Kerpen v. Bill Boyer Ford, Inc.*<sup>535</sup> In so holding, the court stated that the injury did not arise out of the employment, because the causative danger was not "incidental to the character of the business."<sup>536</sup>

Perhaps no aspect of the workers' compensation system is more difficult for an employer to accept than the awarding of compensation to an aggressor in a horseplay incident. Not only is the employee not furthering the employer's interests, but he is also generally disrupting the work of a fellow employee. Then, to his further dismay, the employer finds himself in the anomalous position of paying the employee for injuries that result from such conduct.

The author recognizes that precepts of the workers' compensation law should not be founded solely on the self-serving desires of employers. Yet it seems that courts have made the struggle with this question more ponderous than necessary and that the tests advanced by other writers do not provide the necessary simplicity of application. It is suggested here that the resolution of this problem be made on the basis of the following general premises: first, the innocent victims of horseplay should be compensated; second, horseplay aggressors should be denied compensation unless the employer knew of the conduct and acquiesced in it or the horseplay activity was of an apparently spontaneous and innocent nature.

The latter exemption permits the fact finder to recognize that momentary, apparently harmless departures from the tedium of the work day need not necessarily exclude from coverage one who unexpectedly sustains injury, while at the same time permitting a denial of benefits to one injured while engaging in an elaborate or inherently dangerous activity that bears no relationship to the furtherance of his employer's interests. This test has a legal as well as an equitable basis, since it can be stated that momentary, innocent actions can be expected among individuals working in a repetitious fashion, side-by-side, over extended periods of time and thus arise out of and in the course of employment. The other less innocent actions do not.

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534. *Kerpen v. Bill Boyer Ford, Inc.*, 305 Minn. 47, 47-48, 232 N.W.2d 21, 21 (1975) (footnote omitted).

535. 305 Minn. 47, 232 N.W.2d 21 (1975).

536. *Id.* at 48, 232 N.W.2d at 22.

### G. Violation of Employer Rules or Instructions

In some situations, a violation of employer rules or instructions will bar recovery of compensation benefits.<sup>537</sup> Indeed, the Minnesota Supreme Court stated in a 1973 decision that when "injury-producing conduct is in violation of a specific instruction or order of the employer, benefits are denied."<sup>538</sup> For example, a machinist injured by an explosion while making souvenirs out of shell cases, in violation of the employer's rule banning personal use of the ma-

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537. See, e.g., *Bartley v. C-H Riding Stables, Inc.*, 296 Minn. 115, 206 N.W.2d 660 (1973) (injury suffered when employee thrown from horse he was instructed not to ride held noncompensable); *Walsh v. Charles Olson & Sons, Inc.*, 285 Minn. 260, 172 N.W.2d 745 (1969) (injury suffered while using power jointer earlier prohibited from use not compensable); *Anderson v. Russell Miller Milling Co.*, 196 Minn. 358, 267 N.W. 501 (1936) (death of mill employee from fumigating gas held not compensable when employee violated instructions not to enter mill); *McQuivey v. International Ry.*, 210 A.D. 507, 206 N.Y.S. 851 (1924) (denying compensation to an employee who was fatally burned while sleeping on premises after being instructed to sleep elsewhere). See generally 1A A. LARSON, *supra* note 1, §§ 31.00-33.40 (1979); 6 W. SCHNEIDER, *supra* note 1, §§ 1577-1582; Schmidt & German, *Employer Misconduct as Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81 (1956); Note, *Misconduct of an Employee Which Will Prevent Recovery Under the Workmen's Compensation Law of Pennsylvania*, 27 TEMP. L.Q. 470 (1954). Professor Larson comments:

The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude: if the accident arises out of and in the course of the employment, the employee receives his award.

1 A. LARSON, *supra* note 1, § 2.10 at 5. The Minnesota Supreme Court has also indicated that employee negligence is irrelevant in determining compensation questions. See *Snyder v. General Paper Corp.*, 277 Minn. 376, 384, 152 N.W.2d 743, 748 (1967) (contributory negligence of employee immaterial); *Radermacher v. St. Paul City Ry.*, 214 Minn. 427, 435, 8 N.W.2d 466, 470 (1943) (neither negligence of employer, nor contributory negligence of employee relevant); *McGough v. McCarthy Improvement Co.*, 206 Minn. 1, 5, 287 N.W. 857, 860 (1939) (employee fault or blame immaterial), *overruled in part on other grounds*, *Williams v. Holm*, 288 Minn. 371, 374, 181 N.W.2d 107, 109 (1970). The holdings in these cases were mandated by subdivision 1 of Minnesota Statutes section 176.021 which provides in relevant part:

Every such employer is liable for compensation according to the provisions of this chapter and is liable to pay compensation in every case of personal injury or death of his employee arising out of and in the course of employment without regard to the question of negligence, unless the injury was intentionally self-inflicted or when the intoxication of the employee is the proximate cause of the injury.

MINN. STAT. § 176.021(1) (1978).

538. See *Bartley v. C-H Riding Stables, Inc.*, 296 Minn. 115, 117, 206 N.W.2d 660, 662 (1973). The court qualified this rule by noting that if "contemporaneously with the violation, the employee was performing work in furtherance of his employer's business" compensation is proper. See *id.*

chines, was denied compensation.<sup>539</sup> A similar result occurred when an office boy injured himself when using a cutting machine to make a paper pad in defiance of company rules banning personal use of the machine.<sup>540</sup>

In determining which violations of employer rules or instructions will result in a denial of benefits, several theories have been used.<sup>541</sup> Some courts distinguish between excluded misconduct and covered misconduct by using a prohibited method-prohibited place analysis.<sup>542</sup> Under this theory, employees who merely perform acts using a prohibited method are eligible for compensation, but employees injured as a result of going to a prohibited place are denied compensation.<sup>543</sup> This analysis, however, is of little assistance in most situations because it often rests on an unworkable assumption. The place-method distinction assumes that an employee injured in a prohibited place is only serving a personal purpose.<sup>544</sup> Certainly, many workers injured while using prohibited freight elevators are merely trying to promote efficiency in their work.<sup>545</sup> Denying compensation in these situations should not be based on a theory whose foundation, at best, is suspect.<sup>546</sup>

Some courts also have examined problems in this area by utilizing a test that allows compensation unless the employee departed from work to such an extent that the injury could not be said to have arisen out of the employment.<sup>547</sup> Because this test has no

539. See *Goodyear Aircraft Corp. v. Gilbert*, 65 Ariz. 379, 181 P.2d 624 (1947).

540. See *Radtke Bros. & Korsch Co. v. Rutzinski*, 174 Wis. 212, 183 N.W. 168 (1921).

541. See notes 542-58 *infra* and accompanying text.

542. See, e.g., *Starkel v. Edward Balf Co.*, 142 Conn. 336, 114 A.2d 199 (1955); *Vitas v. Grace Hosp. Soc'y*, 107 Conn. 512, 141 A. 649 (1928); *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 A. 368 (1915); *City of Pembroke v. Jones*, 109 Ga. App. 296, 136 S.E.2d 139 (1964), *aff'd*, 220 Ga. 213, 138 S.E.2d 276 (1964); *Lange v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 257 Minn. 54, 99 N.W.2d 915 (1959); *Anderson v. Russell Miller Milling Co.*, 196 Minn. 358, 267 N.W. 501 (1936).

543. See note 542 *supra*.

544. See note 542 *supra*.

545. See, e.g., *Olson v. Robinson, Straus & Co.*, 168 Minn. 114, 210 N.W. 64 (1926).

546. Even if promoting efficiency in work is only one of the injured employee's aims, compensation may still be mandated based on the dual-purpose rule. This rule is examined in notes 238-75 *supra* and accompanying text.

547. This used to be the Minnesota test. See *Bartley v. C-H Riding Stables, Inc.*, 296 Minn. 115, 117, 206 N.W.2d 660, 662 (1973) (dictum); *Anderson v. Russell Miller Milling Co.*, 196 Minn. 358, 361, 267 N.W. 501, 503 (1936); *Rautio v. International Harvester Co.*, 180 Minn. 400, 405, 231 N.W. 214, 216 (1930); *Olson v. Robinson, Straus & Co.*, 168 Minn. 114, 116, 210 N.W. 64, 64 (1926).

guidelines for its application it lacks appeal, and confuses, rather than simplifies the issue.

Other courts view time as the crucial consideration. *Fowler v. Baalman, Inc.*,<sup>548</sup> a 1950 Missouri decision, illustrates the use of this theory. In *Fowler* the employee, a flight instructor, had a flight cancelled because of bad weather.<sup>549</sup> In violation of his employer's cancellation rule, the employee flew the plane in bad weather and crashed.<sup>550</sup> In denying compensation, the court stated that an employer had the unqualified right to limit the scope of the employee's employment by enacting time limitations.<sup>551</sup>

Perhaps the theory most often used in employee misconduct cases is one based on the distinction between the performance of authorized acts in a prohibited manner and the performance of prohibited acts.<sup>552</sup> Under this theory, the determinative factor is whether the employee was performing a prohibited act, or performing a permissible act in a prohibited manner.<sup>553</sup> If the latter, then compensation is warranted.<sup>554</sup> The only drawback to this theory is that it can be easily used by a result-oriented court.<sup>555</sup> As long as courts respect the plain meaning of the words used in the theory to make the distinction, however, there is little reason for concern. Illustrative of the proper application of this theory is *Bartley v. C-H Riding Stables, Inc.*<sup>556</sup> In *Bartley* the Minnesota Supreme Court reversed an award of compensation to an employee who had been thrown by a horse that the employer had specifically forbid-

548. 361 Mo. 204, 234 S.W.2d 11 (1950).

549. *See id.* at 211, 234 S.W.2d at 16.

550. *See id.*

551. *See id.* at 213, 234 S.W.2d at 17. *But cf.* *Liberty Mut. Ins. Co. v. Boggs*, 66 S.W.2d 787, 794 (Tex. Civ. App. 1933) ("[i]f it were a part of Boggs' business as [an] employee to give flying lessons, then the fact that he disobeyed instructions to return the plane at the time he was directed to do so did not remove him from the course of his employment.").

Perhaps the most poorly reasoned decision denying compensation based on the unauthorized time of performance doctrine is a 1926 Kentucky case that denied compensation to an employee hired to shovel coal in the daytime, because the injury occurred while he was shoveling coal in the evening. *See Consolidation Coal Co. v. Ratliff*, 217 Ky. 103, 288 S.W. 1057 (1926).

552. This is the current Minnesota rule as set forth in *Bartley v. C-H Riding Stables, Inc.*, 296 Minn. 115, 206 N.W.2d 660 (1973).

553. *See id.* at 117-20, 206 N.W.2d at 662-63.

554. *See id.*

555. *See generally* 1A A. LARSON, *supra* note 1, § 31.21, at 6-19 (1979) ("The only tricky feature of this distinction is that it can, by a play upon words, be converted into a contradiction of itself.").

556. 296 Minn. 115, 206 N.W.2d 660 (1973).

den the employee to ride.<sup>557</sup> Although the court indicated that the employee's acts might have been in furtherance of the employer's business, because mounting and riding the horse itself was a prohibited act, rather than a prohibited manner of accomplishing a legitimate goal, the injury did not arise out of the employment.<sup>558</sup>

## V. CONCLUSION

The author's primary purpose in writing this Article has been to assist practitioners and legal scholars in their analysis of arising out of and in the course of problems. In preparing this Article, preliminary thought was given to analyzing "arising out of" separately from the "in the course of" requirement. It was soon discovered, however, that such an analysis would neither be possible nor helpful because each clause is so intimately interwoven with the other. Consequently, this Article has discussed Minnesota's arising out of and in the course of requirement by analyzing time and place and employee activity problems. Obviously, every potential problem falling within the ambit of these classifications could not be discussed. No doubt, the numerous types of injuries for which compensation is sought is limited only by the imagination of creative counsel.

The legislation enacted in 1979 may portend only the beginning of the Legislature's desire to reformulate Minnesota's workers' compensation system. As long as Minnesota's statutory scheme includes the arising out of and in the course of requirement, however, these simple but legally complicated terms will continue to plague practitioners, judges, and scholars in their attempts to determine the compensability of injuries resulting from various fact situations. The author hopes that some of the solutions suggested to the problems examined in this Article will assist others in resolving future arising out of and in the course of issues.

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557. *See id.* at 116-17, 206 N.W.2d at 661-62.

558. *See id.* at 118-20, 206 N.W.2d at 663.