North Dakota Law Review

Volume 41 | Number 2 Article 4

1964

The Going and Coming Rule

Harlan K. Holly

NOTES

THE GOING AND COMING RULE

"The cost of the product should bear the blood of the workman."[1] Therein lies the purpose of the Workmen's Compensation Act; to lift the burden of accident losses from the shoulders of the employee and place it upon the employer. Yet daily, as the masses of gainfully employed[2] proceed to and from their homes and workshops, they are subjected to hazards which are not compensable.[3] Based on the doctrine of stare decises an employee must have been injured while on the employer's premises if his injury was to be compensable. With this line of demarcation drawn the going and coming rule evolved. "It was that ordinarily injuries in going to and coming from work were not compensable, they arose neither out of nor in the course of employment."[4]

To understand the reason behind the creation of the "going and coming" rule, it is necessary to understand the meaning of the words "in the course of employment." Various attempts have been made to define this phrase since most compensation acts fail to define it. An injury or an accident befalls a man "in the course of" his employment, if it occurs while he is doing what a man so employed may reasonably do and at a place where he may reasonably be during that time.[5] "In the course of" is sometimes referred to as "during" the employment or "while at work" or "while the employment was in progress."[6]

Once an employee began his actual work there could be no question but that he was "in the course" of his employment. But suppose he was in the factory and was merely bending over to start his first operation, or putting on his overalls or merely entering the front door? What about an injury on the snow and ice on the front public sidewalk which the employer was supposed to keep shoveled? Or, still further back, what about an injury when the employee slipped while hurrying from his home to the shop, in order to get there on time? His primary purpose was employment; should the injuries be compensable? The "going and coming" rule said no!

---

1. Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 158 Pac. 256 (1916).
2. 1 LARSON, WORKMEN'S COMPENSATION LAW, § 5.30 (1952, Supp. 1964) (compensation coverage relative to total labor force in 1960 placed at seventy-eight and two tenths per cent).
3. Pilhen v. Workmen's Compensation Bureau, 60 N.D. 465, 235 N.W. 354 (1931).
4. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION, p. 671 (1947).
5. Industrial Indem. Exch. v. Industrial Acc. Comm'n, 26 Cal. 2d 130, 156 P.2d 926 (1945).
6. Fields v. Brown Paper Mill Co., 28 So. 2d 755 (La. 1946); *In re* Jensen, Jensen v. Manning & Brown, Inc., 63 Wyo. 88, 178 P.2d 897 (1947).

Thus it was inevitable that, like all narrow rules read into workmen's compensation acts, many exceptions would develop. Currently, injuries occurring to an employee while going to or coming from work are compensable under the North Dakota Workmen's Compensation Act if they fall within the following restrictive circumstances: when (1) traveling itself is part of the job; (2) the employer furnishes the transportation to or from work; (3) the employee is subject to emergency calls; (4) the employee is doing, while traveling, something incidental to his employment; (5) and the employee is injured while proceeding on employer's premises.[7]

This article is concerned primarily with the question of liability under compensation acts for injuries sustained by an employee when he is not on the premises of his employer. Due to the complexity of the questions involved this discussion must be limited to those exceptions recognized in North Dakota and some of the more widely accepted trends in other jurisdictions.

THE EXCEPTIONS

An injury may be compensable, although incurred while off the premises of the employer, if:

(a) *The Traveling Itself is Part of the Job*

The underlying theory for this exception is that the journey itself is part of the service to the employer.[8] Among the decisions so holding a New York case, *Carney v. Senak New York Corp.*,[9] is an excellent illustration. In this suit the deceased, who worked as a policeman on the 4 p.m. to midnight shift, and at other times as an outside salesman operating out of his home, was fatally injured at 3:30 a.m. while driving home in his automobile. The court decided to award death benefits against the employer who employed him as a salesman, giving as a reason that outside salesmen, working out of their homes in no fixed location, are usually covered by workmen's compensation from the time they leave home until they return. Whether or not the deceased was performing business errands immediately prior to the accident appears to have had little bearing.

Under most circumstances an employee who is required to travel as a part of his business duties, but then deviates from his business route, is not eligible for compensation under this exception. In *Erickson v. Erickson & Co.*,[10] an architect, while on a business trip, sustained injuries when he proceeded beyond his destination to pick

7. Fink v. Workmen's Compensation Bureau, 68 N.D. 531, 282 N.W. 505 (1938).
8. Stasel v. American Radiator & Standard Sanitary Corp., 278 S.W.2d 721 (Ky. 1955); King v. State Indus. Acc. Comm'n, 211 Ore. 40, 309 P.2d 159 (1957); Keim v. Burkholder & Johnson, 182 Pa. 460, 127 A.2d 752 (1956).
9. Carney v. Senak New York Corp., 17 App. Div. 2d 170, 233 N.Y.S.2d 316 (1962).
10. Erickson v. Erickson & Co., 212 Minn. 119, 2 N.W.2d 824 (1942).

up guests whom he planned to take back to his home. The journey was held personal and therefore not compensable. The traveling at the time of injury was taking him further and further from his business destination. Such cases are clearly identifiable as deviations from business routes for personal side trips and thus beyond the course of employment. When the employee however, has completed a personal side trip and is once again on the assigned business route, the courts will find injuries compensable.[11]

Some questions arise when the employee who has deviated, completes his personal mission and is injured while returning to the business route. The majority deny compensation under these circumstances,[12] as in the case where the decedent's duties involved driving cars between the main garage and a subsidiary storage garage. On the fatal occasion he had gone past the storage garage to his home and was killed at a railroad crossing while returning to the business route.[13] The theory here is that such a side trip is a personal deviation until completed (actual resumption of the business route).

The minority decisions which award compensation, usually do not involve clear cut cases of personal side trips and allow compensation on the ground that the employee's only purpose is to attain his employment destination.[14]

(b) *The Transportation is Furnished or Paid for by the Employer*

If injuries are sustained by a workman, while he is being conveyed to or from his work, by a means provided for by the employer, they are compensable pursuant to either an implied or expressed contractual obligation.[15] There is disagreement, however, with the "contract" theory as a basis for liability; courts indicate that the true reason is that the employer has "control" of the transportation.[16] The justification for this holding is that the employer has himself expanded the range of employment and attendant risks and that the provided transportation must be considered part of the employer's premises.

Although this exception is generally recognized, the courts have handed down conflicting decisions when the employer is a public transportation company. Injuries sustained by employees traveling

11. White v. Morris, 182 Pa. Super. 454, 127 A.2d 748 (1956).
12. Kayser v. Carson Pirie Scott & Co., 203 Minn. 578, 282 N.W. 801 (1938); Kinkead v. Management & Eng'r Corp., 130 S.W.2d 545 (Mo. 1937); Luke v. St. Paul Mercury Indem. Co., 140 Neb. 557, 300 N.W. 577 (1941); Clegg v. Interstate Ins. Co., 130 N.J.L. 307, 32 A.2d 570 (1943).
13. Public Serv. Co. v. Industrial Comm'n, 395 Ill. 238, 69 N.E.2d 875 (1946).
14. London Guar. & Acc. Co. v. Herndon, 58 S.E.2d 510 (Ga. 1950); Sawtell v. Stern Bros. & Co., 44 S.W.2d 264 (Mo. 1931); 1 LARSON, WORKMEN'S COMPENSATION LAW, § 19.33 (1952, Supp. 1964).
15. Hunter v. Summerville, 205 Ark. 463, 169 S.W.2d 579 (1943); I-L Logging Co. v. Manufacturers & Wholesalers Indem. Exch., 220 Ore. 277, 273 P.2d 212 (1954); Taylor v. Meeks, 236 S.W.2d 969 (Tenn. 1951).
16. Peski v. Todd & Brown Inc., 158 F.2d 59 (7th Cir. 1946).

home from work on free passes have been held to be compensable in New Jersey and California.[17] These courts have found no distinction between this type of employer and others. On the other hand, in New York, compensation was denied an employee riding on a free subway pass.[18] Where compensation has been awarded the application of the exception may be justified on either the "contractual" or "control" theories. The question of application, however, could be raised where city employees have been injured while walking home along city streets.[19]

The question, of whether an employee is covered while departing from or entering the employer's provided means of transportation, has arisen in the course of litigation. Should the doctrine extend that far? Compensation has been denied when street car employees have been injured while crossing the street in order to avail themselves of a free ride.[20] There are cases permitting compensation under similar situations.[21] The cases allowing compensation, when the employee is alighting from the conveyance, have based their decisions on special agreements which required the employers to see the employees safely home.[22] Under what theory benefits can be awarded in these situations is questionable. In an Arkansas case[23] the court indicated it could extend the free pass principle to include travel from the employer's gate to the employee's front door.

Usually, when the cost of the transportation is furnished by the employer the court will give it consideration when a substantial distance is involved.[24] Even if the distance is not great a separate agreement between the parties may bring it within this exception; as in the situation where the employee is induced by his employer to continue employment. Such was the case where the employer promised to furnish transportation and the employee was injured while attempting to procure a street car ride after being informed transportation was not available.[25] Perhaps the possibility of denying an award should be kept open when the transportation allowance is in fact nothing but a small added compensation, with no evidence that the travel is sufficiently important in itself to be regarded as part of the service performed.[26]

---

17. City & County of San Francisco v. Industrial Acc. Comm'n, 61 Cal. App. 2d 248, 142 P.2d 760 (1943); Micieli v. Erie R.R., 131 N.J. 427, 37 A.2d 123 (1944).
18. Tallon v. Interborough Rapid Transit Co., 232 N.Y. 410, 134 N.E. 327 (1922).
19. Caravello v. City of Milwaukee, 194 Wis. 190, 215 N.W. 911 (1927).
20. Dellepiani v. Industrial Acc. Comm'n, 211 Cal. 430, 295 Pac. 826 (1931); De Voe v. New York State Rys., 218 N.Y. 318, 113 N.E. 256 (1916).
21. Ward v. Cardillo, 135 F.2d 260 (D.C. Cir. 1943); Owens v. Southeast Ark. Trans. Co., 216 Ark. 950, 228 S.W.2d 646 (1950).
22. Sihler v. Lincoln—Alliance Bank & Trust Co., 280 N.Y. 173, 19 N.E.2d 1008 (1939).
23. Owens v. Southeast Ark. Trans. Co., *supra* note 21.
24. Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950); *In re* Jensen, Jensen v. Manning & Brown, Inc., 63 Wyo. 88, 178 P.2d 897 (1947).
25. Katz v. Katz, 137 Conn. 134, 75 A.2d 57 (1950).
26. Orsinie v. Torrance, 96 Conn. 352, 113 Atl. 924 (1921); Taylor v. Taylor Tire Co., 285 S.W.2d 173 (Ky. 1955).

Another inherent difficulty with the exception arises when the employee, being paid for his travel, does not go directly home. This can be illustrated by the employee who interrupts his homeward journey for personal reasons and is injured when he later resumes the trip.[27] The multiplicity of situations may be the reason the compensation statutes do not attempt to cover going to and from work.

(c) *The Employee is Subject to Call*

When an employee is subject to call twenty-four hours a day and is actually responding to a special call, he is held to be in the course of his employment.[28] There would seem to be no valid distinction between an injury incurred while in route to work, in response to the special call, and one incurred while going directly home after the purpose of the special call is completed.[29]

The problems under this exception occur when the employee is injured in an accident while performing some personal business while awaiting call. Several theories have been suggested by the courts such as the act must be incidental to his employment;[30] he must remain under the control of the employer;[31] or the act must have been one a reasonable person would have done under the same circumstances.[32] Although the burden of proving the injury arose out of and in the course of the employment is on the claimant,[33] it has been indicated that the acts of the employee are immaterial as long as he is subject to call[34] and within reach of his employer.[35] An excellent illustration of this rule is found in a case where a highway electrician, who was on twenty-four hour stand-by duty requiring him to be available at his home to answer telephone calls, was injured while performing a purely personal mission in his employer's vehicle and was out of the area in which he could be reached. The court denied compensation saying he had made it impossible to receive calls.[36]

To include the strictly personal acts of the on call employee seems to enlarge the meaning of the statute beyond its reasonable import. Because of the inconveniences and continuous duties involved in such situations, however, the rule may be considered reasonable by some.

---

27. Dooley v. Smith's Transfer Co., 26 N.J. Misc. 129, 57 A.2d 554 (1948).
28. Reisinger-Siehler Co. v. Perry, 165 Md. 191, 167 Atl. 51 (1933).
29. Voehl v. Indemnity Ins. Co. of N. Am., 288 U.S. 162 (1933); Turner Day & Woolworth Handle Co. v. Pennington, 250 Ky. 433, 63 S.W.2d 490 (1933); Smith v. Industrial Comm'n of Ohio, 90 Ohio App. 481, 107 N.E.2d 220 (1948).
30. Loyola Univ. v. Industrial Comm'n, 408 Ill. 139, 96 N.E.2d 509 (1951).
31. Duffy v. Levine, 275 App. Div. 735, 87 N.Y.S.2d 134 (1949).
32. Long v. Hardware Mutual Ins. Co., 137 So. 2d 486 (La. 1962).
33. London Guar. & Acc. Co. v. Herndon, 58 S.E.2d 510 (Ga. 1950).
34. Duerock v. Acarrequi, 390 P.2d 55 (Idaho 1961).
35. Bush v. Houston Fire & Cas. Ins. Co., 152 So. 2d 377 (La. 1903).
36. *Ibid.*

It would seem that under the statutes many of the cases to which the subject-to-call principle is applied should not be compensable, unless they could be classed under one of the other exceptions.

(d) *The Act Done by the Employee is Incidental to His Employment*

This exception remedies the special problems created when the traveling employee must, of necessity, engage in purely personal acts during business trips and suffers an injury thereby. For example, when he is injured while sleeping, resting, bathing or doing any of the innumerable things a person may do for his personal comfort or convenience.

Miller v. F. A. Bartlett Tree Expert Co.[37] provides an interesting example of the application of this exception. Claimant, at the request of his employer, attended an annual conference held by the employer. His work, during the day, required him to become especially dirty and as he was expected to be neat and clean for the evening conference he retired to his hotel room, and while bathing, slipped and injured himself. The court held that since claimant's employment demanded his participation in both day and evening sessions the injury suffered between those sessions arose out of and in the course of employment.

This phase of the rule has been given two constructions in relation to acts not in the direct service of the employer. The "indirect benefit" theory holds that the employee's act must benefit the employer at least indirectly[38] and the "part of the employment" theory holds that an act, whether beneficial or not, is a part of the employment if it is of the general nature of the work or if it is a particular custom and practice of the occupation.[39] The "indirect benefit" theory requirement leads to employer responsibility for almost all acts in which an employee may indulge, since any act which satisfies the employee may be said to incidentally benefit the employer.[40] The "part of the employment" theory is equally unsatisfactory if these personal acts are placed within the protection of the statute regardless of when or where they take place. The result could be unlimited employer liability in contravention of the purpose of workmen's compensation statutes which are not designed

37. Miller v. Bartlett Tree Expert Co., 3 N.Y.2d 654, 148 N.E.2d 296 (1958).

38. De Sautel v. North Dakota Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942).

39. Thiede v. Searle & Co., 278 Mich. 108, 270 N.W. 234 (1936).

40. Carried to its logical extreme, when an employee watches television, eats or sleeps while at home, these acts may by said to be incidentally beneficial to the employer. *But see* Davis v. Newsweek Magazine, 305 N.Y. 20, 110 N.E.2d 406 (1953). A swim in the ocean for employee's benefit and enjoyment, although it may possibly benefit the employer in a remote sense; held not in the course of employment of a traveling editor.

to provide accident and health insurance.[41] If either of these theories is to be a satisfactory criterion in determining whether an employee is "in the course of" employment, it must be limited so that there is some work connection.

(e) *The Employee is Injured on the Premises*

Since the course of employment is not confined to the actual manipulation of the tools of the trade, at what point after the employee reaches the employer's premises, but before the actual work commences, should the benefits of workmen's compensation be available to him? Injuries sustained by an employee, while going to or from his place of work, upon the premises owned or controlled by his employer, are generally deemed to have occurred in the course of employment.[42]

The cases which pose the greatest amount of difficulty under this exception, are those which attempt to expand the employer's premises. The courts hold, that if the injury occurs after the employee has left the premises of his employer and reached a public highway, any injury which he might receive as a result of an accident, that is common to the general traveling public, is not received in the course of employment.[43] Various attempts have been made to broaden the concept of premises, especially where the injury occurs just outside the boundary.[44] One of the best available discussions on both sides of this problem may be found in *Barnet v. Britling Cafeteria Co.*, which by a four to three division, affirmed an award of compensation to a claimant who slipped on the ice on the public sidewalk in front of the employer's place of business, just as she was about to enter.

The majority said that the sidewalk in front of the premises was equivalent to part of the premises since it was essential to the employer's business as an avenue of entrance. The court indicated that the zone of danger is a material element for consideration because:

> A workman might be on the premises of one other than his employer, or in a public place, and yet be so close to the scene of his labor, within its zone, environments and hazards as to be, in effect, at the place and under the protection of the act.[45]

41. It is not the purpose of the workmen's compensation acts to substitute accident and health insurance. Muchmore v. Industrial Comm'n of Ariz., 81 Ariz. 345, 306 P.2d 272 (1957).

42. Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928).

43. Miracle v. Harlan Wallins Coal Corp., 311 Ky. 169, 223 S.W.2d 738 (1949).

44. Papineau v. Industrial Acc. Comm'n, 45 Cal. App. 181, 187 Pac. 108 (1919), (where the injury occured in a passageway); *In re* Sundine, 218 Mass. 1, 105 N.E. 433 (1914), (where the injury occured on a common stairs).

45. Barnett v. Britling Cafeteria Co., 225 Ala. 462, 143 So. 813 (1932).

Since the weight of modern authority permits a very broad definition of premises it seems only natural that the extension would be made to reach parking lots,[46] public roads,[47] and, as in a Wisconsin case,[48] the intersection of a railroad and a public highway, giving as a reason the fact that the roadway was recognized as the proper way for employees to approach and leave the premises.

MULTIPLICITY OF EXCEPTIONS AND EROSION OF THE RULE

The exceptions have multiplied from year to year, as court upon court, believing the general rule to be unfair and artificial, has sought to ameliorate it by excepting cases which have appealed to it as coming within the spirit of the workmen's compensation acts.

The cases have caused the expansion of the original exceptions to the point of actual erosion of the rule. With judicial determinations have come additional and even wider exceptions.[49] Manifestly, the numerous exceptions have swallowed up the rule and when that occurs must the rule be abolished? As was said by Justice Lummus in *Carter v. Yardly and Co.*:

> Almost as soon as that asserted general rule had been laid down requirements of justice in particular cases impelled the courts to make exceptions. . . . The time has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results . . . . We now abandon it in this commonwealth.[50]

---

46. McIvor v. Savage, 220 Cal. App. 128, 33 Cal. Rept. 740 (1963).

47. Ganassi v. Pittsburgh Coal Co., 162 Pa. Super. 289, 57 A.2d 717 (1948).

48. Northwestern Fuel Co. v. Swanson, 197 Wis. 48, 221 N.W. 396 (1928).

49. Compensation has been allowed under the following circumstances: Where employees have been injured en route to or from work in vehicles, public and private, including car pools sanctioned by the employer, even though the use of this transportation was not ordered, Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365 (1950); Where the injuries were sustained by employees who were subject to call at all hours or at the moment of the injury, Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944); Where one has been injured while traveling as part of his employment, Olson Drilling Co. v. Industrial Comm'n, 386 Ill. 402, 54 N.E.2d 452 (1944); Where the employee has been injured while on a special errand, Hartford Acc. & Indem. Co. v. Bond, 199 S.W.2d 293 (Tex. Civ. App. 1946); Where a salaried employee was injured on his way to do further work at home or having started work at home is injured en route to his office to continue his work, Lang v. Board of Educ., 70 S.D. 343, 17 N.W.2d 695 (1945); Where an employee who was required to bring his auto to the place of business was injured while driving to or from the employment premises, Davis v. Bjorenson, 229 Iowa 7, 293 N.W. 829 (1940); Where special hazards on the employee's normal route cause his injury, Kuharski v. Bristol Brass Corp., 132 Conn. 563, 46 A.2d 11 (1946); Where the injury was sustained by the employee on sidewalks adjacent to or near the employment premises, Gullo v. American Lead Pencil Co., 118 N.J.L. 445, 193 Atl. 804 (1937); Where the employee was injured by hazards of the employment which extended beyond the premises, Freire v. Matson Nav. Co., 19 Cal. 2d 8, 118 P.2d 809 (1941); Where the entire road system from the employee's home to the premises of his employment is considered within the area of compensability, Warren's Case, 97 N.E.2d 184 (Mass. 1951).

50. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946). This case overruled the Massachusettes cases denying the manufacturer's liability. 1 LARSON, WORKMEN'S COMPENSATION LAW, § 15.11, p. 195, § 18.32, p. 256 (1952, Supp. 1964). Larson admits that it is an artificial rule and adds, "If the going and coming rule is about to be subjected to a process of gradual erosion, through the device of finding some tidbit of work performed at home, in fairness to employees generally the entire doctrine should be scrapped and a fresh start should be made in which all goings and comings are covered". 14 NACCA L.J. 394, 400 (1954). This article concluded that: "There is a great opportunity

Should North Dakota follow the example of Massachusetts or should the courts adhere to the rule, only allowing compensation to an employee injured while going to or coming from work if he comes within the five exceptions presently recognized in this jurisdiction?[51]

Many recent decisions have avoided the strict application of the going and coming rule,[52] thus indicating that the special exceptions have appealed to the consciences of judges. Does this determine, however, that the general rule has no sound basis in workmen's compensation acts and is it at variance with the need for the general security of injured workers in the dangerous world in which we live today?

Various reasons have been advanced for refusing to compensate an employee for injuries sustained while traveling to and from work:

(1) The employer exerts no control over the employee's travel: the employee is free to use any means of transportation and travel at any hour and to use any route he wishes, providing he arrives at work on time.[53]

(2) The risks involved in the journey are no greater than those incurred by anyone traveling for any purpose.[54]

(3) Travel to work is too far divorced from the productive process to foist upon the consumer the ultimate burden of insuring against injuries arising therefrom.[55]

---

for some courageous judge to reconsider the going and coming rule in view of the modes to thought today. A rule which has developed at least six recognized exceptions since it was announced in England in 1908, is evidently, if not moribund, deserving of overhauling as a whole."

51. Fink v. Workmen's Compensation Bureau, 68 N.D. 531, 282 N.W. 505 (1938).

52. Lane v. Industrial Acc. Comm'n, 331 P.2d 99 (Cal. 1958); United States Cas. Co. v. Russell, 105 S.E.2d 378 (Ga. 1958); Callihan v. Fireman's Fund Indem. Co., 110 So. 2d 758 (La. 1959); De Pasquale v. John W. Cowper Co., 175 N.Y.S.2d 833 (N.Y. 1958).

53. "In applying the 'going and coming rule' and its various so-called exceptions certain fundamental principles must be . . . kept in mind. . . . Where transportation to and from work is . . . furnished by the employer . . . and is under his control, it may fairly be said that . . . conditions to compensation are satisfied. Where these elements are lacking, however, and the employees are traveling according to their own arrangements and by whatever means are conveniently available, the opposite is true." Kobe v. Industrial Acc. Comm'n, 35 Cal. App. 2d 33, 207 P.2d 849 (1949), *rev'd*, 35 Cal. 2d 33, 215 P.2d 736 (1950). The court found that the employer had by inference contracted to insure the worker against injuries suffered between home and work; Liberty Mutual Ins. Co. v. Cardillo, 154 F.2d 529 (D.C. Cir. 1946) *rev'd.*, 330 U.S. 469 (1947). The court conceded that control was a factor in departing from the going and coming rule, but held that on all the facts, an exception was warranted. In the following cases compensation was awarded, the court finding an element of control to take the situation out of the scope of the going and coming rule: Ross v. Sunrise Food Exch., 273 App. Div. 833, 75 N.Y.S.2d 897 (1948); Industrial Comm'n v. Murphy, 50 Ohio 148, 197 N.E. 505 (1935).

54. "[I]njuries received by the workman in going to or coming from . . . work are not compensable . . . unless . . . by reason of the employment there was some increased or additional exposure of the injured person to the kind or character of the hazard or danger which caused the injury." Dubbert v. Beucus, 96 Ind. App. 390, 185 N.E. 311 (1933). See Harlan Collieries Co. v. Shell, 239 S.W.2d 923 (Ky. 1951).

55. "[T]he spirit of the . . . law requires that the employee must be actually about the furtherance of his master's business when the casualty occurs. . . . If one is proceeding

If these are the reasons for the going and coming rule, are the exceptions logical? The rule was essentially an expression of policy and was invoked to impose what was considered to be a reasonable limitation on the scope of protection.[56]

If "in the course of" were defined in the compensation acts as during working hours, and only during that period, then of course the worker would not be protected going to and from work. Or if it expressly limited its protection only to injuries while on the premises, the courts would not have to strain their mental resources to determine whether the case came within the general rule or one of the exceptions.

CONCLUSION

It would appear that the North Dakota courts have gone farther in giving a liberal interpretation to the Workmen's Compensation statute and in carrying out its humanitarian purposes than other jurisdictions upon similar facts. In *DeSautel v. North Dakota Workmen's Compensation Bureau*,[57] a ward attendant, in an institution for the feebleminded, had fixed hours of work which extended from 6 a.m. to 7:15 p.m., and which included, in addition to two rest periods, a fixed lunch hour from 12:30 to 1:00. It was "understood," according to the majority opinion, that she would take her lunch at her home, which was just across the highway and about one hundred feet away. But, the dissent points out that she could lunch where she pleased and that the employer had no control over the place chosen. While walking toward her home, on her own premises and on her way to lunch, she fell and was injured. On these facts, compensation was awarded. Under this generalization, it is apparent that all lunch hours, under all circumstances, would be gathered within the protecting arms of the compensation act. It is doubtful that this was the intention of the drafters of the North Dakota Workmen's Compensation Act. It would appear that the purpose of the Act was to lift the burden of accident losses from the shoulders of the employee and place them upon the employer. But, how much of a burden should the employer be required to carry? It was inevitable that exceptions would be established by the courts that

---

to his home for needed rest and refreshment, can he be regarded as engaged in the furtherance of the affairs of his employer?" American Indemnity Co. v. Dinkins, 211 S.W. 949 (Tex. Civ. App. 1919); See Richtarik v. Bors, 142 Neb. 226, 5 N.W.2d 199 (1942).

56. In 1914, Hills v. Blair, 182 Mich. 20, 148 N.W. 243 (1914), held that an injury sustained during ordinary travel to and from work did not arise 'out of and in the course of' employment, as required for compensation by the 1912 Michigan Workmen's Compensation Act, Mich. Pub. Acts Ex. Sess., No. 10. The "grandfather" California going and coming case is Ocean Acc. & Guar. Co. v. Industrial Acc. Comm'n, 173 Cal. 313, 159 Pac. 1041 (1916). It was held, just three years after passage of the California Workmen's Compensation Act, California Stat. 1913, § 12, p. 283, that an injury to an employee was not compensable if sustained while going to or coming from work.

57. De Sautel v. North Dakota Workmen's Compensation Bureau, 72 N.D. 35, 4 N.W.2d 581 (1942).

laid down the general rule, but perhaps, in this age of increased hazards of transportation, the courts of North Dakota should consider each case on an individual basis. The expansion of the exceptions could be disregarded and their decisions based on whether or not the situation falls within those and only those exceptions recognized in this jurisdiction at the present.

With the modern trend of ever expanding exceptions, it may be the duty of the legislature to state which ones, if any, fall within the true spirit of the law.

HARLAN K. HOLLY