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Workmen's Compensation—Injuries in Course of Employment—Personal Activities

this ruling which seems to be the prevailing one. *Stowell v. Standard Oil Co.* (1905) 139 Mich. 18, 102 N. W. 227; *Skinn v. Reutter* (1903) 135 Mich. 57, 97 N. W. 152; *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633; *U. S. Radiator Co. v. Henderson et al., supra.*

One Court, however, allowed recovery where the article was not dangerous to human life but was dangerous only to property. *Ellis et al. v. Lindmark et al.* (1929) 177 Minn. 390, 225 N. W. 395. There the defendant was negligent in selling linseed oil as cod liver oil to be used for poultry food. And see *Murphy v. Sioux Falls Serum Co.* (1921) 44 S. D. 421, 184 N. W. 252; (1923) 47 S. D. 44, 195 N. W. 835. The instant case, however, confines its ruling "to cases in which the use of the product is imminently dangerous to life and property." A. J. G. '36.

WORKMEN'S COMPENSATION—INJURIES IN COURSE OF EMPLOYMENT—PERSONAL ACTIVITIES.—Employee, a traveling salesman whose expenses were borne by his employer, contracted typhoid fever while eating in a restaurant. This proceeding was under the Workmen's Compensation Law. *Held*, that the injury did not "arise out of and in the course of employment." Compensation denied. *Johnson v. Smith* (1933) 263 N. Y. 10, 188 N. E. 140.

This was a four to three decision, the majority holding this an exclusively personal activity and refusing to draw any distinction between these circumstances and those where the employee took a definite lunch period away from the place of employment and bought his own meal, in which case any injury clearly would not be compensable. *Clark v. Voorhees* (1921) 231 N. Y. 14, 131 N. E. 553. The dissenting opinion on the other hand, reasoned that "the employment was continuous from the time he left his employer's place of business, and his eating lunch was a necessary incident to his employment."

While unanimous in denying recovery for injuries sustained in the employee's personal pursuits, a clear conflict obtains as to whether eating and sleeping belong in this category. In *Wynn v. Southern Surety Co.* (Texas Civ. App. 1930) 26 S. W. (2d) 691, a traveling salesman, with expenses paid, was killed on his way to his hotel, having finished his evening meal. Compensation was denied on the ground that "a traveling salesman while eating his meal or sleeping at hotels, or attending church or theaters, or going on picnics or private errands for his own pleasure or profit, is not, within the contemplation of the Workmen's Compensation Act . . . an injury received in the course of his employment." But in the case of *Walker v. Speeder Corp.* (1932) 213 Iowa 1134, 240 N. W. 725, a traveling salesman with all expenses paid who was injured while on the way to get a meal furnished by the employer, received compensation on the ground that this was a necessary incident to his work. Recovery was also granted for poisoning by food, where the employee on a particular day was told to lunch at employer's expense, near the office so as to be more available for an expected emergency call. *Krause v. Swartwood* (1928) 174 Minn. 147, 218 N. W. 555. A strike breaking employee, housed by the employer near the plant and subject to call 24 hours a day, was injured while returning from his evening meal at a nearby restaurant. *Crippen v. Press Co., Inc.* (1930) 228 App. Div. 727, 239 N. Y. S. 102. And in *Hobson v. Dept. of Labor and Industries of Wash.* (Wash. 1934) 27 Pac. (2d) 1091, a nightwatchman on duty 24 hours a day was injured while returning from the place where he got his food and mail. Recovery was allowed in both instances.

Other pertinent cases present the problem of an injury sustained while sleeping. Closely in point is the case of a traveling salesman, who, with all expenses paid, was injured in attempting to escape when his hotel caught fire at night. Denying recovery is *Kass v. Hirschberg* (1920) 191 App. Div. 300, 181 N. Y. S. 35, and an earlier California case, *Forman v. Industrial Accident Commission* (1916) 31 Cal. App. 441, 160 Pac. 857. But these were following by a Minnesota case, *Stransberry v. Monitor Stove Co.* (1921) 150 Minn. 1, 183 N. W. 977, and a Connecticut decision, *Harivel v. Hall-Thompson* (1923) 98 Conn. 753, 120 Atl. 603, both granting compensation. Recognizing that if the salesman had lodged and boarded on the employer's premises, it would be conceded that his employment continued during this period, these latter cases refuse to distinguish in principle between the furnishing of lodging and board by the employer upon his own premises or upon the premises of another.

In a later Connecticut case the employer furnished the workmen with a barn near the place of employment, in which to sleep if they so desired, the matter being discretionary. Recovery was denied for injuries suffered when the barn in which the employee was sleeping caught on fire. *Guiliano v. Daniel O'Connell's Sons* (1927) 105 Conn. 695, 136 Atl. 677. In principle, this case can be contrasted to the established rule that an employee will be compensated for injuries suffered while lunching on the premises of the employer, at his discretion, and with the employer's consent. *Matter of McInerney v. Buffalo & Susquehanna R. Corp.* (1919) 225 N. Y. 130, 121 N. E. 806.

In another New York case, a traveling salesman, injured from a fall while dressing in his hotel room, preparatory for his day's work, was denied recovery. *Davidson v. Pansy Waist Co.* (1929) 240 N. Y. 584, 148 N. E. 715.

The variety of decisions makes obvious the conclusion that it is impossible to formulate an absolute test for determining whether an accident occurred while a workman was acting within the scope of his employment, as no one rule can govern all cases, and each must be controlled by the particular facts. *Piske v. Brooklyn Cooperage Co.* (1918) 143 La. 455, 78 So. 734.

The cases indicate two distinct attitudes. The one extends the awarding of compensation to include injuries sustained in personal activities which are a necessary incident to the employment; the other, a stricter construction of the phrase "course of employment" denies recovery unless the injury occurs while the servant is actually furthering the interests of his master.

I. J. W. '35.