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## Workmen's Compensation: Immoral Activity as Within Scope of Employment

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## RECENT DECISIONS

present decision. In that case, an employee watching a baseball game on the employer's property during the lunch hour was injured by a swinging bat. The game was not sponsored by the employer but he allowed recreational activity to take place during the lunch hour. The *Luterau* case, though generally agreeing with the Michigan theory that the injury must have occurred while the employee was actively engaged in the employer's business to be compensable, can be distinguished from the instant case in that watching a baseball game at the time of the injury is quite remote from the employer's service as compared with walking on the employer's driveway on the way to lunch, especially since the game was not sponsored by the employer and the cafeteria was so sponsored. The court did not think this difference was sufficient to draw the line between an activity falling within the course of employment and one which did not. But, by not so distinguishing, Michigan comes squarely in conflict with the general rule in the country.

Though the application of workmen's compensation is made easier under the Michigan interpretation that the employee must be actively engaged in the employer's business at the time of the injury to be compensable, the justice of such a position is questionable. Since most states would have awarded compensation to the plaintiff, it appears that such an injury as she sustained was intended to come within most workmen's compensation statutes. *American Steel Foundries v. Czapala*, 112 Ind. App. 212, 44 N.E.2d 204 (1942); *Weiss v. Friedman's Hotel*, 37 Erie 237 (1953), *aff'd.*, 176 Pa. Super. 98, 106 A.2d 86 (1954). By strictly construing the words "in the course of employment" Michigan has apparently subverted the very purpose of the act—to place the financial burden of industrial accidents on the employer as an expense of the business which received the benefits of the injured employee's services and which engendered such accident. *New York Central R.R. Co. v. White*, 243 U. S. 188 (1917).

Diane C. Gaylord

### *Workmen's Compensation: Immoral Activity as Within Scope of Employment*

A bank vice president, while on an "all expense paid" business trip in New York, was burned to death in his hotel room. A woman not his wife but registered as such also died as a result of the fire in the room. There was evidence of drinking and it was determined that the conflagration had been caused by careless smoking although there was no determination as to which of the two occupants had been actually responsible. Held, (5-2): Death benefits should not have been denied. *Wiseman v. Industrial Accident Commission*, — Cal. 2d —, 297 P. 2d 649 (1956).

In California, as in over forty other states, compensation is awarded for injuries "arising out of and in the course of employment." CAL. LABOR CODE §3600; N. Y. WORKMEN'S COMPENSATION LAW §10. These qualifications are conjunctive and must be independently applied, the latter to time and place, the former in reference to casual origin. *Ward & Gow v. Krinsky*, 259 U. S. 503 (1922); *Davis v. Newsweek Magazine*, 305 N. Y. 20, 110 N.E.2d 406 (1953). Thus, though the two phrases are seldom distinguished, *Tedesco v. General Elec. Co.*, 305 N. Y. 544, 110 N.E.2d 406 (1953), it can be said roughly that the most frequent issue under the "arising out of" clause will concern the nature of the injury affecting the employee, whereas the "in the course of" question concerns what the employee was doing at the time of the injury.

As a general rule a commercial traveler is within the course of employment during the entire period of travel. *Harivel v. Hall-Thompson Co.*, 98 Conn. 753, 120 Atl. 603 (1923); *In re Buck's Estate*, 277 App. Div. 126, 98 N. Y. S. 2d 743 (3d Dep't 1950). Injuries to travelling employees resulting from hotel fires are compensable since the employment brought the employee in contact with the risk which in fact caused the injury and it is irrelevant that there might be no greater risk to the employee within his own home. *Souza's Case*, 316 Mass. 332, 55 N.E.2d 611 (1942); *Blake v. Grand Union Co.*, 277 App. Div. 914, 98 N. Y. S. 2d 738 (3d Dep't 1950), *leave to appeal denied*, 301 N. Y. 843, 95 N.E.2d 57 (1950). Injuries caused by careless smoking are compensable since smoking is so common as to be considered an ordinary and necessary incident of the employment, such as walking and going to the bathroom. *Puffin v. General Elec. Co.*, 132 Conn. 279, 43 A.2d 746 (1945), *Whiting-Mead Commercial Co. v. Industrial Accident Commission*, 178 Cal. 505, 173 P. 1105 (1918); *Chludziwski v. Standard Oil Co.*, 176 App. Div. 87, 162 N. Y. Supp. 225 (1916). Other personal acts, such as bathing or dressing, even though incidental to the employment, are held to be too remote to be considered a risk which industry must bear, *Davidson v. Parsy Waste Co.*, 240 N. Y. 584, 148 N. E. 715 (1925); contra where the injured was a domestic worker: *Martin v. Plaut*, 293 N. Y. 617, 59 N.E.2d 429 (1944); *Employer's Liability Assurance Corp. v. Industrial Accident Commission*, 37 Cal. App. 2d 567, 99 P. 2d 1089 (1940).

The majority in the instant case found that the employee was necessarily within the course of employment since neither illegality, *Breimhorst v. Beckman*, 227 Minn. 409, 35 N.W.2d 719 (1949), nor the presence of a companion for an immoral purpose, *State Employee's Retirement System v. Industrial Accident Commission*, 97 Cal. App.2d 380, 217 P. 2d 992 (1950), remove it therefrom so long as the employment is being concurrently attended to. The dissent argued that the activity of the deceased could reasonably have been found by the finders of fact, the respondent Commission, not to be that "reasonably contemplated by the employment."

## RECENT DECISIONS

The dissent's formula would seem to be the better rule of law and one more conformable with the general view. *Industrial Commission of Ohio v. Abern*, 119 Ohio 41, 162 N. E. 272 (1928); *Schneider v. United Whelan Drug Stores*, 284 App. Div. 1072, 135 N.Y.S.2d 875 (3d Dep't 1954). All activity cannot be deemed a community or a business risk but neither is it practicable to attempt to catch all possible fact situations within one net of law. The better rule would seem to be a reasonable man test, *Lewis v. Knappen Tippetts Abbott Engl. Co.*, 304 N. Y. 461, 108 N.E.2d 609 (1952), or, as stated in *Masse v. Robinson Co.*, 301 N. Y. 34, 37, 92 N.E.2d 56, 57 (1950), compensable activity should be limited to that which the "man on the street" would associate with the employment.

Richard O. Robinson

### *Dismissal of State Employee Without Hearing Upon His Claiming Privilege Against Self-Incrimination Held Illegal*

Petitioner, a professor in a city college, was dismissed summarily pursuant to a city charter provision which provided in effect that a city employee who utilized the privilege against self-incrimination in refusing to answer questions of a duly authorized legislative committee would be discharged from such employment. N. Y. CITY CHARTER §903 (1936). The state interpreted the statute to mean that invocation of the privilege without more was equivalent to a resignation. *Daniman v. Board of Education of City of N. Y.*, 306 N. Y. 532, 119 N. E. 2d 373 (1954). On petitioner's proceeding to annul his dismissal, held (5-4): the statute as interpreted and applied was violative of the Fourteenth Amendment "due process" clause as being arbitrary and patently discriminatory. *Slochow v. Board of Higher Education*, 350 U. S. 551 (1956).

While a state has broad powers in selection and discharge of its employees, *Adler v. Board of Education of City of N. Y.*, 342 U. S. 485 (1951); *Garner v. Board of Public Works*, 341 U. S. 716 (1950), the protection of the Fourteenth Amendment extends to such public servants when exclusion from public employment is pursuant to a statute. *Wieman v. Updegraff*, 344 U. S. 183 (1952). It is well established that there is no precise definition of the requirements of due process; however, one requirement is that a judicial action not be patently arbitrary or discriminatory. *Twining v. New Jersey*, 211 U. S. 78 (1908); *Hurtado v. California*, 110 U. S. 516 (1884). If the invocation of the privilege against self-incrimination should not in and of itself produce a stigma upon the claimant's character, then the requirements of due process will not have been met under a summary dismissal, for both the innocent and guilty will be dismissed without a fair hearing to determine guilt.