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Workmen's Compensation—Distance Requirement Held Determinative of Re-Entry into Course of Employment

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WORKMEN'S COMPENSATION—DISTANCE REQUIREMENT HELD DETERMINATIVE OF RE-ENTRY INTO COURSE OF EMPLOYMENT

Employee of defendant drove past an intersection two and one-half blocks from customer's home and proceeded a considerable distance on a personal mission. Upon returning toward customer's home employee was fatally injured in an accident which occurred six blocks from his destination. *Held* (4-3): Workmen's Compensation award vacated on the ground that employee was not within the course of employment at the time he sustained injury. *Carner v. Sears Roebuck & Co.*, ___ Mich. ___, 59 N. W. 2d 263 (1953).

Virtually all Workmen's Compensation Acts provide that in order to be compensated, the injury must "arise out of and in the course of employment." MECHEM, OUTLINES OF AGENCY § 603 (4th ed. 1952); Brown, *Arising Out Of and In the Course Of Employment In Workmen's Compensation Acts*, 7 WIS. L. REV. 15 (1931). If the workman sustains injury which has some reasonable causal connection with the conditions of employment, while he is engaged in the performance of a duty for which he was employed, such injury is compensable. *McNicol's Case*, 215 Mass. 497, 102 N. E. 697 (1913).

The considerations determinative of questions concerning "course of employment" (at least concerning reasonable space and time limits thereof) under Workmen's Compensation are much the same as in the case of an employer's liability for the torts of his servant. PROSSER, TORTS, § 69 (1941). It is well established that if the servant is on a "frolic of his own" and not engaged in the performance of a function of employment, his master is not liable for his torts. *Joel v. Morison*, 6 C. & P. 501, 172 Eng. Rep. 1338 (1834); *Krolak v. Chicago Express*, 10 N. J. Super. 60, 70 A. 2d 266 (1950).

It is the general rule that if the accident caused by the servant's negligence occurs after he has passed his proper destination and while en route to his personal objective, the employer is not liable. *Freeza v. Schauer Tool & Die Co.*, 322 Mich. 293, 33 N. W. 2d 799 (1948); *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038 (1901). In some jurisdictions the entire unauthorized trip, going and returning, is treated as outside the course of employment. *Public Service Co. v. Illinois Industrial Comm.*, 395 Ill. 238, 69 N. E. 2d 875 (1946); *Curry v. Bickley*, 196 Iowa 827, 195 N. W. 617 (1923).

Under the generally recognized "concurrent cause" or "combined purpose" theory, however, an employee may perform some

personal task while still predominately in the performance of a function of his employment, and be acting thereby "within the course of employment." *Marks v. Gray,* 251 N. Y. 90, 167 N. E. 181 (1929); See *Anderson v. Kroger Grocery Co.,* 326 Mich. 429, 40 N. W. 2d 209 (1949); RESTATEMENT, AGENCY § 237, comment *a* (1933). It should be noted that the *primary* purpose of the servant's activity must be related to his employment, and not his personal business. *Marks v. Gray, supra* at 93, 167 N. E. at 183; *McNew v. Puget Sound Pulp Co.,* 37 Wash. 2d 495, 224 P. 2d 627 (1950).

The most troublesome aspect of the general problem of "frolic and detour" has involved the determination of conditions effecting re-entry after the servant has deviated from the ambit of his employment, completed his personal mission and begun to return, but has not yet reached his authorized destination or point of deviation. MECHEM, OUTLINES OF AGENCY §§ 392, 393.

The New York test of re-entry is that all of the circumstances surrounding the incident of return will be considered in the determination of whether the employee was in the service of his master at the time of the accident. *Riley v. Standard Oil Co.,* 231 N. Y. 301, 132 N. E. 97 (1921). Reasonable proximity within space and time limits, and the employee's intention to act in the service of his master are the essential guides in this determination. RESTATEMENT, AGENCY § 237. It should be noted that in New York a simple commencement of return in the direction of the authorized destination is in itself insufficient to establish re-entry. *Fiocco v. Carver,* 234 N. Y. 219, 223, 137 N. E. 309, 311 (1922); *accord, Brinkman v. Zuckerman,* 192 Mich. 624, 159 N. W. 316 (1916). On the other hand, some jurisdictions do hold that as soon as the servant commences to return he re-enters the employment of his master. *Cain v. Marquez,* 31 Cal. App. 2d 430, 88 P. 2d 200 (1939); *Meyn v. Dulaney Miller Auto Co.,* 118 W. Va. 545, 191 S. E. 558 (1937). It has also been held that where a servant was not on a direct route toward his proper destination, although he had returned to a point less distant therefrom than the point of his deviation, he was outside the course of employment. *Irwin v. Williamson Candy Co.,* 268 Mich. 100, 255 N. W. 400 (1934). However, once the servant ". . . has returned to the place where the deviation occurred, or to a corresponding place . . . where in the performance of his duty he should be" the relation of master and servant has been restored. *Murphy v. Kuhartz,* 244 Mich. 54, 221 N. W. 143, 144 (1928).

The approach of the court in the instant case seriously restricts the conditions required to effect re-entry: the employee must return to a point less distant from his authorized destina-

tion than the point of his deviation, as well as be on a direct route thereto. It may be questioned why the court did not consider the "concurrent cause" doctrine, of which it seemed to approve in *Anderson v. Kroger Grocery Co., supra,* when the facts tend to indicate that the case lends itself to such treatment. In any event, it may be concluded that the instant case mechanically circumscribes the conditions of recovery under Workmen's Compensation without regard to other circumstances which may more accurately characterize the servant's activity. The more flexible New York test of re-entry obviates the inequities resulting from the application of a mechanical standard divorced from other circumstances.

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