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"INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT"

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INTRODUCTION

To attempt to cover the vast field of law which has developed from the ten title words would require an article filling one complete volume of the *Missouri Law Review* and even then many aspects of this portion of workmen's compensation law would be untouched. It is the aim of this article to alert the reader to problems encountered in this aspect of a compensation claim and, in attempting to do so, reference will be made to specific situations in which problems arise and the prevailing Missouri cases touching on the subject. Each particular type of injury, whether arising from "horse play," going to or from work, from acts being done for the employee's personal comfort or convenience, from employee recreational activity, or from an assault by a coemployee, has been covered, to a greater or lesser extent, of course, by Missouri case law which will be examined herein.

In approaching a workmen's compensation case in which the question arises as to whether the injury arose out of and in the course of employment, aid can undoubtedly be found in cases which have touched on the specific type injury involved, e.g., one which occurs when the employee is on a coffee break. Decisions touching matters which may be somewhat related to a case under consideration, or which are concerned with injuries treated by the courts even more generally under the phrase, "arising out of and in the course of employment," should be given little weight because of the subtle distinctions which have developed. This article will not go into cases from other jurisdictions but, as in other areas of the law, in dealing with a particular problem which has not arisen in the appellate courts of Missouri, undoubtedly cases in point from other states will be referred to by, and an aid to the decision of, our own courts.

A word of caution is in order before proceeding. Many times, in seeking to determine whether an injury arose out of and in the course of employment, attorneys will look to the law of respondeat superior, concluding that

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if there is a situation in which a master would not be liable for his servant's acts, this supports the view that an injury under the same facts would be incompensable under the workmen's compensation laws. The law dealing with the vicarious liability of a master for his servants' torts is not analogous to the liability of an employer under workmen's compensation. For example, only in a rare case will a master be liable in tort to a third party for acts of an employee while the latter is going to or from work and is in no way furthering the master's business. In such situations the case fails to meet the agency "scope of employment" test.[1] In the workmen's compensation case, however, we find courts quite often hold that employees who have suffered injuries in this situation are entitled to statutory benefits.[2]

THE STATUTORY REQUIREMENT

The statute establishing the requirements for a compensable injury provides:

> If both employer and employee have elected to accept the provisions of this chapter, the employer shall be liable irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.[3]

Though at first blush the requirements seem simple enough, a brief examination of the digests and text authorities will reveal that there is more involved than a casual reading of the statute might indicate. In fact, it is doubtful that any other area of workmen's compensation law has resulted in more litigation, on either the trial or appellate level, than has the requirement that the injury arise out of and in the course of employment.

Larson indicates that the requirement is adopted from the British Compensation Act and that it is now the basic provision of the workmen's compensation acts of practically all American jurisdictions.[4] There are, of course, variations from state to state but even so, the judicial interpretation of the requirement remains in large, a universal problem. Texts have been

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1. See, 1 RESTATEMENT (SECOND), AGENCY § 219 (1958).
2. Metting v. Lehr Constr. Co., 225 Mo. App. 1152, 32 S.W.2d 121 (K.C. Ct. App. 1930); Garrison v. United States Cartridge Co., 197 S.W.2d 675 (St. L. Ct. App. 1946); Murphy v. Wells-Lamont-Smith Corp., 155 S.W.2d 284 (St. L. Ct. App. 1941).
3. § 287.120(1), RSMo 1959.
4. 1 LARSON, WORKMEN'S COMPENSATION LAW 41 (1952).

written which refer to the different doctrines which have been formulated by various state courts in handling this matter.[5] These will not be discussed for the article is to be confined to Missouri law. The varied jurisdictional tests may, however, become important when a Missouri court is confronted with a peculiar set of facts with which they have not previously had the opportunity to deal. Again, help may be found in decisions of other jurisdictions in spite of possible variations, for the actual approach taken by all courts is basically the same.

In Missouri, as in most states, "arising out of and in the course of employment," gives rise to two separate requirements both of which must be independently satisfied before compensation will be awarded. Satisfaction of only one requirement will be insufficient for a recovery. Each case must be tested to ascertain whether the two requirements are met and, in order to have a better understanding of the problem involved and to clarify the analysis of a given case, it should be approached with each separately in mind. That is, it should first be asked, "did the injury arise out of the employment?" and second, "did it occur in the course of employment?" Or, as stated in *Everard v. Women's Home Companion Reading Club:*[6]

> [T]o be compensable there must be evidence adduced to show that the injury arose out of and in the course of the employment; and that a showing of either element alone, without the other, is not sufficient to justify an award of compensation.[7]

Also keep in mind that the courts approach cases concerned with whether injuries arose out of and in the course of employment from the view that each case should be decided upon its own particular facts and circumstances rather than by a mechanical application of some word test or definition.[8]

It is, of course, a simple matter and common practice to generalize in interpreting statutory phrases such as the one with which we are here dealing. However, it is often found that generalization is misleading and of little help to the attorney faced with the practical problem of securing a recovery for his client-employee or defending against a recovery for his client-employer. Our courts have consistently stated that the term "arising out of and in the course of employment" as used in the statute should be given its

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5. See, for example, 1 LARSON, *op. cit. supra* note 4.
6. 234 Mo. App. 760, 122 S.W.2d 51 (St. L. Ct. App. 1938).
7. *Id.* at 764, 122 S.W.2d at 54.
8. Nichols v. Davidson Hotel Co., 333 S.W.2d 536 (Spr. Ct. App. 1960); Goetz v. J. D. Carson Co., 357 Mo. 125, 206 S.W.2d 530 (1947); King v. City of Clinton, 343 S.W.2d 185 (K.C. Ct. App. 1961).

plain, usual and ordinary meaning.[9] From this it would seem that clarity should result and little difficulty be encountered. This is not the case. The solution to a given case is rarely simple for either the attorneys or judges who seek to answer the question, "did the injury in issue arise out of and in the course of the employment?"

A. *"Arising Out Of"*

In separating the two requirements, as we must to determine if the injury is compensable, the implications of the term "arising out of" shall be examined first. This problem, in the mind of the author, has never seemed as bewildering as the determination of whether the injury arose "in the course of employment." Perhaps the only explanation for this is that in the actual cases with which the author has dealt this was true, or perhaps it is attributable to the fact that in determining if one requirement has been met the legal analysis is inherently more easily applied than in the other.

Larson refers to four different tests used in the interpretation of the term "arising out of."[10] Two of these, in particular, are beneficial in explaining the position of Missouri courts on the subject. He speaks first of the "peculiar or increased risk doctrine," stating that:

> Under this view, an injury arises out of the employment only when it arises out of a hazard peculiar to or increased by that employment, and not common to people generally.[11]

The other rule of interpretation is termed the "actual risk doctrine" and Larson points out that more and more courts are turning to this test. In essence, the actual risk doctrine finds the court saying, "We do not care whether this risk was also common to the public, if in fact it was a risk of *this* employment."[12] The latter test gives broader scope to the law and permits recovery in instances where the increased risk doctrine would not.

The courts of Missouri follow the actual risk doctrine in looking to the hazards involved in the particular employment which they are considering. As brought out in *Conley v. Meyers*,[13] the phrase "in the course of" establishes a test with reference to time, place and activity to determine if there is

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9. Leilich v. Chevrolet Motor Co., 328 Mo. 112, 40 S.W.2d 601 (1931); Sawtell v. Stern Bros. & Co., 44 S.W.2d 264 (K.C. Ct. App. 1931).
10. 1 LARSON, *op. cit. supra* note 4, at 43-44.
11. 1 LARSON, *op. cit. supra* note 4, at 43.
12. *Ibid.*
13. 304 S.W.2d 9 (Mo. 1957).

any connection between the employment and the accident. An "injury arises out of the employment" when there is a causal connection between conditions under which work is required to be performed and the resulting injury.

Many later cases state that an injury having a direct causal connection with the employment arises out of employment if it is a rational consequence of some hazard connected with the work being done.[14] An earlier case which treats the subject matter fully and in a basic manner is *Duggan v. Toombs-Fay Sash & Door Co.*,[15] in which the court says that an injury arises out of the employment when it occurs within the employee's period of employment and at a place where he may reasonably be while engaged in that employment. In the *Duggan* case the employee was a salesman who, on Sundays, was required to send postcards to prospective customers advising them of the day of the week he would call on them. On the Sunday the injury occurred the employee completed the postcards but failed to take them to the post office that morning as was his custom. That afternoon he took them to a neighborhood mail box which had a Sunday evening pick up. Members of his family accompanied him and, after mailing the postcards, they called on friends who lived within a block of the mailbox and played bridge for some two hours. On leaving the home of his friend, the employee made another stop to pick up his son and while proceeding to his home the accident occurred which caused the injuries in question. The court referred to the usual rule that every case of this type should be decided upon its own particular facts and circumstances and not by reference alone to some formula. The court said further that unless the employee was fulfilling a duty of his employment, or was engaged in some incident thereto, he was not entitled to compensation. In ruling that the claim was not compensable, the court pointed out that there was no causative connection between the injury and the employment, in that the employee failed to show that the accident originated from his work or while he was engaged in or about the furtherance of the affairs of his employer. The question might well be raised whether a Missouri court, faced with the facts of the *Duggan* case today, would reach the result that was reached in 1933.[16]

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14. Heaton v. Ferrell, 325 S.W.2d 800 (Spr. Ct. App. 1959); King v. City of Clinton, *supra* note 8.

15. 228 Mo. App. 61, 66 S.W.2d 973 (Spr. Ct. App. 1933).

16. For a case to the same general effect as the *Duggan* case, see Wamhoff v. Wagner Elec. Corp., 187 S.W.2d 865 (St. L. Ct. App. 1945), *aff'd*, 354 Mo. 711, 190 S.W.2d 915 (1945) (en banc), and Annot., 161 A.L.R. 1454 (1946).

B. *"In the Course of"*

In speaking of the "in the course of" requirement, Larson asserts that it relates to the connection between the work and the injury in reference to time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity which has a purpose related to the employment.[17] This view has been adopted by the Missouri courts. A number of cases have asserted that an injury arises in the course of employment when it occurs within the period of the employee's employment, at a place where he may reasonably be, and while he is reasonably fulfilling duties of his employment or is engaged in doing something incidental thereto.[18]

As pointed out earlier, "arising out of and in the course of" gives rise to separate requirements each of which must be proved for a case to be compensable. However, in any particular case dealing with either or both of them, it may be found that they are linked closely together and are difficult of separation for purposes of analyzing a particular result.

Before proceeding to the particular problems which may arise in dealing with the statutory requirement, it might be well to point out a basic factor which is often overlooked. That is, the compensation claimant has the burden of establishing that the injury did, in fact, arise out of and in the course of employment.[19] In *Oswald v. Caradine Hat Co.*,[20] it was said:

> The burden of proof was on plaintiffs to show that the employee's death resulted from an accident arising out of and in the course of his employment, and not on defendants to show the contrary.[21]

It must also be kept in mind, however, that it is the aim of our Workmen's Compensation Law to give relief to every employee who sustains injuries which arise out of and in the course of employment. To succeed in this, the law should be liberally construed and if, on the established facts, a doubt exists as to the employee's right to compensation, it should be resolved in favor of the employee.[22]

C. *Injuries Occurring in Special Situations*

Before turning to more specific problems which arise under the statutory

17. 1 LARSON, *op. cit. supra* note 4, at 193.
18. Jordan v. Chase Hotel, 244 S.W.2d 404 (St. L. Ct. App. 1951); Conley v. Meyers, *supra* note 13.
19. Harger v. Acme Fast Freight, Inc., 336 S.W.2d 109 (Mo. 1960) (en banc); Jordan v. Chase Hotel, *supra* note 18; Heaton v. Ferrell, *supra* note 14.
20. 109 S.W.2d 893 (St. L. Ct. App. 1937).
21. *Id.* at 896.
22. Conyers v. Krey Packing Co., 194 S.W.2d 749 (St. L. Ct. App. 1946); § 287.800, RSMo 1959.

requirement, the author would like to preface this portion of the article by pointing out that it will not cover all facets of this area of the law, but only those situations which seem to arise most often and those on which there may be a change in the approach taken by our courts.

1. Going to or from the Place of Employment

A situation frequently before the courts arises when an employee sustains injuries in going to or coming from the place of his employment. Compensation benefits are often allowed in these situations even though the employee may not, at the time of injury, have been doing work in furtherance of the business of the employer and even though it may have occurred before or after regular working hours. These injuries shall be considered under two categories. First, those which occur on the employer's premises and second, those which occur off the employer's premises.

a. On the Premises

As to injuries occurring on the premises of the employer at a time when the employee is not on his job, e.g., in going to or from work or during the lunch period, the general rule, and that followed in Missouri, is that such injuries *may be* compensable. In considering these cases we must keep in mind the rule enunciated in the *Duggan* case[23] that to be compensable an injury must occur within the employee's period of employment at a place where he may reasonably while engaged in that employment. It is clear that in the vast majority of these cases, the court, in holding the injuries compensable, must do so irrespective of the requirement that the injury occur within the employee's period of employment for most often that element is lacking. This would seem to indicate that the vital element which the court must find is whether or not the injury was suffered as a result of a risk of *this* employment.[24] If the injuries occur on the premises of the employer, at a time when the employee has a right to be there, even though the employee is going to or from work, it would be difficult to find fault with a holding that this is a risk of employment and compensable though it does not occur during the employee's working time. It is submitted, then, that the key phrase to look for in these cases may well be, "is the injury a risk of *this* employment?"

An early Missouri case which dealt with an injury suffered by an employee on his employer's premises while the employee was leaving his job was *Metting v. Lehr Constr. Co.*[25] There, the employee was working as a

23. Duggan v. Toombs-Fay Sash & Door Co., *supra* note 15.
24. See, 1 LARSON, *op. cit. supra* note 4, at 43.
25. 225 Mo. App. 1152, 32 S.W.2d 121 (K.C. Ct. App. 1930).

laborer in the construction of a grain storage tank. To work on the tank it was necessary for workers to ascend to a rather high point over a series of ladders on the outside of a building and, by the same token, to descend over the same obstacles. Primarily, workers went up and down the ladders but, in addition to this, there was a rope attached to a wooden beam through a suspended pulley which was installed for the purpose of hoisting material which some workers occasionally used to slide down as a faster means of descending at the end of the day. On the day the injury occurred the employee attempted to slide down the rope. The rope was not attached to a weight, as it usually was, so that it failed to hold and the employee fell to the ground sustaining injuries which ultimately resulted in his death. The question was, of course, whether the employee, in using this method to descend from the building, was killed as a result of an accident "arising out of and in the course of his employment." The court ruled that he was, saying:

> Ordinarily the act of leaving the premises by an employee, after his day's work is done, is as much 'in the course of' his employment as engaging in the actual work which he is employed to do. There is no question but that deceased was yet engaged in his employment when he was killed.[26]

As to the "arising out of" issue, the court said that the act of the employee in attempting to leave his work in this manner was not so wholly unconnected with his employment as to justify a holding that it did not "arise out of his employment." The court felt it could reasonably be said to have been incidental to, and within the sphere of, his employment. The court brought into the consideration of the case what apparently is a foreseeability test, stating that under all the circumstances the conduct of the employee was an act that the defendant reasonably might have anticipated.

Another "premises" case, which the court handled with little difficulty was *Garrison v. United States Cartridge Co.*[27] In that case the employee was leaving work at the end of her shift and was going down a stairway leading to an exit of the building in which she worked. At the end of the working day there invariably was a rush of people pushing to get out of the building as quickly as possible. As the claimant was descending the stairs she was pushed by the crowd behind her causing a fall resulting in

26. *Id.* at 1156, 32 S.W.2d at 124.
27. 197 S.W.2d 675 (St. L. Ct. App. 1946).

injuries for which she sought compensation. The court easily found that the injuries were compensable, stating that:

> While it is the general rule that an injury sustained by an employee while going to or from his work is not compensable, there is an exception where the accident occurs after the employee has come upon the employer's premises or at a place so close to the premises as to be a part thereof, or, as in this case, where it occurs before the employee leaves the premises or place at the conclusion of his work.[28]

Occasionally our courts extend "premises" to include public sidewalks as was done in *Murphy v. Wells-Lamont-Smith Corp.*[29] The court was there concerned with an employee who was injured while walking to work on a public sidewalk which was adjacent to the employer's premises. She was not to be at work until 7:30 a.m. and the injury occurred about 7:15 a.m. When injured, she was passing over a portion of the sidewalk which crossed a driveway into the employer's plant shipping yard. The court held that the claimant could recover, finding that the sidewalk was something more than a public way insofar as the employer was concerned. The employer had, for its own purpose and benefit, taken advantage of its occupancy of abutting premises to use a part of the sidewalk as a driveway into its property. It had thus created a greater hazard to those using the sidewalk than would have ordinarily been the case. Because of the use which had been made of the sidewalk the court said that the normal public walk cases were not controlling.

> The court, in the *Murphy* case, seems to be following the view that: As an exception to the general rule that injuries sustained by an employee while going to or from work are not ordinarily compensable, injuries which occur to an employee while going to or from his work and after he has come upon the employer's premises *or at a place so close thereto as to be considered a part thereof,* or before leaving such premises or place, as the case may be, are held compensable.[30] (Emphasis added).

Fault may be found with a test which attempts to rest liability on the nearness of an accident to the employer's premises, or which refers to a "reasonable" distance from the premises, or which, because of the location of the accident, seeks to identify surrounding areas with the actual prop-

28. *Id.* at 676.
29. 155 S.W.2d 284 (St. L. Ct. App. 1941).
30. 71 C.J. *Workmen's Compensation Acts* § 445 (1935).

erty of the employer. This is pointed out, not in criticism of the *Murphy* holding which can likely be justified on a number of grounds, but because such a rule forces a line to be drawn. There is no inherent evil in so doing for lines are, of course, necessarily established in all areas of the law. In this situation, however, there is a double problem facing the court. After getting over the not informidable hurdle of allowing recovery for injuries which have, in fact, occurred off the premises of the employer, the court is then faced with the other problem of just how far off the premises may an accident occur and still be compensable. This will indeed make for difficult cases. It is suggested that the *Murphy* decision would best have been based on the court's finding a causal connection between conditions under which the claimant was forced to approach and leave the premises and the act which resulted in the injury. The employee was subjected to a particular hazard which did in fact have a connection with her employment, and for this reason she should have a recovery.[31]

Finley v. St. Louis Smelting & Refining Co.[32] involved an employee who sustained an injury to his hand while adjusting the fan belt on his own automobile. His car was parked on a company parking lot and the incident occurred after working hours when the claimant was preparing to leave for home. In attempting to start his car he found the fan stuck so he raised the hood and while trying to move it, the fan caught his hand causing injury. The parking lot was maintained by the company and it would seem that ordinarily injuries occurring there would be compensable. The court ruled, however, that this injury was not subject to a claim. The basis of the decision was that the activities leading to injury were not to be reasonably anticipated and expected by the employer, and the employee's actions were not an incident to his employment. The court said further that the employee was not injured because of a peculiarity of the premises to which he was subjected because of his employment. The case illustrates that not all premises cases are compensable. There remains the requirement of a causal connection between employment and

31. A case concerned mainly with the status of the claimant as an "employee" under the statutes is notable in this area. In Ott v. Consolidated Underwriters, 311 S.W.2d 52 (K.C. Ct. App. 1958), the plaintiff had signed an employment contract and was injured in leaving the premises. Although she was not to commence her work until sometime later, compensation was granted her. See, Donzelot v. Park Drug Co., 239 S.W.2d 526 (St. L. Ct. App. 1951), for a "sidewalk" case in which compensation was denied.

32. 361 Mo. 142, 233 S.W.2d 725 (1950) (en banc).

injury; that is, a risk to which the employee was exposed because of his employment.

Other than the "premises" type cases we have just seen, our courts generally find that where a workman has completed his services for his employer and has no further duties for the day, he cannot recover for an injury sustained.[33]

b. Off the Premises

Turning now to injuries occurring off the employer's premises, there are some general rules which are often more confusing and misleading than they are of actual assistance in their application to a given set of facts and for this reason they should be cautiously applied. Before getting into the problems in this area, two authoritative statements will serve as an introduction to the approach of the Missouri courts to "off premises" fact situations. The first:

> The courts, however, have generally recognized that an injury which occurs while an employee is on his way to or from work, and away from the employer's plant, does not arise out of and in the course of the employment.[34]

The second is that put forth by Schneider:

> The general rule, supported by the weight of authority, is that when employees are injured on the street, from causes to which all other persons using the street are likewise exposed, the injury cannot be said to arise out of the employment.[35]

In *Tucker v. Daniel Hamm Drayage Co.*,[36] an employee was injured at 7:45 a.m. while on his way to the building in which he was to work. He was due on the job at 8:00 a.m. and had taken a streetcar to a point

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33. See also, Anderson v. Pickwick Hotel, Inc., 313 S.W.2d 39 (K.C. Ct. App. 1958). An interesting case in the general area is Blair v. Armour & Co., 306 S.W.2d 84 (K.C. Ct. App. 1957), where, under the facts, compensation was granted for injuries sustained on the employer's premises some two hours before the claimant was to begin his regular work. *Accord,* Daniels v. Krey Packing Co., 346 S.W.2d 78 (Mo. 1961).

34. 28 A.L.R. 1409 (1924).

35. 1 SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION 824 (2d ed. 1932). This statement should be read in conjunction with the discussion of the actual risk doctrine, *supra* note 12 and accompanying text, and such cases as Goetz v. J. D. Carson Co., *supra* note 8, and Dehoney v. B-W Brake Co., 271 S.W.2d 565 (Mo. 1954). Schneider's language is broader than necessary and will cause difficulty when applied to such cases as traveling salesmen injured on the highways. However, courts often speak in a similar vein when they are reaching a given result.

36. 171 S.W.2d 781 (St. L. Ct. App. 1943).

near the building. On alighting from the streetcar he proceeded toward the building on a route chosen by himself, and on which he was required to cross a railroad track. In crossing, he was struck by a train and injured. Compensation was denied, the court pointing out that the injuries were sustained on tracks which had no connection with the building where the employer's work was being done or with the employer himself. The intersection at which he was injured was a public thoroughfare used by the general public. The court indicated that had he been injured by a locomotive on a spur track leading into the building where he was to work, such injury likely would be compensable either as a risk incidental to the employment or as abnormal risk arising from the requirement that he cross tracks to get to his place of work.

The St. Louis Court of Appeals set out the apparent Missouri law in *Garbo v. P. M. Bruner Granitoid Co.*[37] In that case the injured employee left work at the close of the week's work to return to his home in St. Louis, some fifty miles from the work site. In denying recovery the court hypothesized that had the right to transportation or the right to reimbursement for travel expenses been given the employee by the terms of his contract and the injury had been sustained in connection with such transportation, it would be one arising out of and in the course of his employment. Proceeding, however, the court said if transportation is provided by the employee himself, without reimbursement, it amounts to no part of the employment and an injury received during such travel is incompensable. They went on to point out that the trip to and from one's place of work is merely an inevitable circumstance with which every worker is confronted and which ordinarily bears no immediate relation to the actual services performed.

In the "off premises" area, however, cases involving salesmen required to be on the road in furtherance of their employer's business are treated differently. Even so, *Dehoney v. B-W Brake Co.*,[38] is difficult to reconcile with the stated law of Missouri. In this case, a salesman had been sent to an area in Kansas to determine the demand for his employer's product. He was killed in an accident at 12:30 a.m. while returning to a motel where he planned to spend the night. It was shown that he called on regular customers during the day, the last call being around

37. 249 S.W.2d 477 (St. L. Ct. App. 1952).
38. *Supra* note 35.

5:00 p.m. No evidence was adduced to indicate what he did between the time of his last appointment and the accident. Awarding compensation, the court carefully explained that they were not attempting to formulate rules relating to salesmen on the road which would be of general application, but were confining their ruling strictly to the evidence before them. The court seemed, however, to do a great deal of speculating, stating that there was no factual support that the employee had abandoned his employment at 5:00 p.m., or that he had been engaged in any independent personal mission of his own. They said that he could have reasonably been visiting customers, new or old. The objection to the ruling is not founded so much on the decision as it relates to salesmen cases generally, but rather on the fact that the court apparently places the burden of proof on the employer, whereas, supposedly, the employee has the burden to show that the injury arose out of and in the course of employment. From the facts appearing in the opinion it would seem that claimants failed to sustain their burden and the court relied on speculation because the employer and insurer failed to offer evidence negativing the fact that the decedent was in the course of employment.[39]

Before moving from the area of injuries sustained off the employer's premises in going to or from the place of employment, attention should be called to the interesting problems raised by the dual purpose doctrine. The doctrine is brought into play when an employee is injured in the course of a journey for a personal reason and on the same trip is performing a service for his employer. This doctrine is not limited in application, of course, to situations where the employee is going to or from his employment.

Missouri courts recognize the dual purpose doctrine, expressly saying so in *Corp v. Joplin Cement Co.*[40] The court explained the doctrine in the following manner:

> Briefly stated, the doctrine is that if the work of the employer creates the necessity for travel, he [the employee] is in the course

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39. Goetz v. J. D. Carson Co., *supra* note 8, involved a claimant who was injured while getting a soda off his employer's premises. See also the interesting result (compensation denied) in Scherr v. Siding & Roofing Sales Co., 305 S.W.2d 62 (St. L. Ct. App. 1957), which is difficult to reconcile with the *Goetz* case. For a case giving broad scope to workmen's compensation as applied to traveling salesmen see Spradling v. International Shoe Co., 270 S.W.2d 28 (Mo. 1954).

40. 337 S.W.2d 252 (Mo. 1960) (en banc).

> of his employment, even though he at the same time is serving some purpose of his own.[41]

In this case, the court recognized that the doctrine has, at times, been construed to be applicable only when the *primary purpose* of the trip is the employer's business. The court rejected this view, however, asserting that if the trip would ultimately have had to be made, and if the employer had the necessary errand accomplished, even though by combining it with the employee's personal trip, there is a concurrent reason for the trip and injuries suffered thereon will be compensable.

2. Recreational Activities

With industry tending more and more to recognize benefits of employee recreational activities, courts are often faced with compensation claims for injuries sustained at such events. As illustrated below, Missouri's courts have, on occasion, had the problem before them, but it would be difficult to glean any general rules from the decisions which seem near the point of conflict.

In *Graves v. Central Elec. Power Corp,*[42] an employee drowned in an attempt to rescue his small son who had fallen from a boat while the family was attending a picnic sponsored by the employer. The evidence indicated that the decedent was, in effect, ordered to attend the picnic and while there was performing standby duty for the employer. Compensation was awarded. The court found the necessity for the attempted rescue was brought about by a condition of employment, stating that the employer reasonably could have foreseen the events which occurred; that the employee might face the necessity of attempting a rescue of a drowning son and that he would respond to an emergency placed before him by reason of the fact that he was performing duties of his employment under the conditions then existing. Without taking issue with the court's theory of recovery, it can be generally stated that if an employee is on duty when an event occurs which causes injury, the chances are he will be entitled to compensation.

An earlier case[43] involved a situation similar to that found in the *Graves* case and compensation was denied. It is doubtful, however, that if faced with the same facts today, the court would again give judgment

41. *Id.* at 255. *Accord,* Gingell v. Walters Contracting Corp., 303 S.W.2d 683 (K.C. Ct. App. 1957).

42. 306 S.W.2d 500 (Mo. 1957).

43. Dunnaway v. Stone & Webster Eng'r Co., 227 Mo. App. 1211, 61 S.W.2d 398 (K.C. Ct. App. 1933).

for the defendant. In this case the employee was working on a barge which was in a lake. The employees were in a situation which required them to have their lunch on the barge. After lunch, but before resuming work, the employee took a swim from the barge and drowned. The employer knew of the propensity of the employee's to swim from the barge, but had made no request or demand that the activity be stopped. It would seem that the accident could be considered as occurring on a part of the employer's premises and that the swim itself could be viewed as an accepted practice and as a refresher to employees better enabling them to do their afternoon work.

3. "Horse Play" and Assaults

Another situation which frequently arises and one which is often troublesome for the courts occurs when an injury results from either horse play or an assault by a fellow employee. As to horse play, it is generally held in Missouri that injury to a nonparticipating victim is compensable.[44] As to assaults by fellow employees, *Lardge v. Concrete Prod. Co.*[45] indicates the problems involved. That case was concerned with a death resulting from a blow inflicted on one employee by another. The decedent was on his job when a fellow employee charged that decedent had accused him of stealing his wine. The assailant struck the decedent on the head with an iron rod which, as indicated, resulted in death. The court held there could be no recovery as it was a personal quarrel. There was no reasonable relation between the injury and employment, or stated somewhat differently, the court, recognizing that the accident must have arisen out of and in the course of employment, found that wine was not permitted on the premises and had nothing to do with the work of either of the parties.

4. Heat

Cases in which heat prostration or exhaustion are involved are no longer so numerous as they once were. This likely can be attributed to a change in the ability of industry to make working conditions more favorable. However, it remains a problem with which courts are still, on occasion, faced in dealing with workmen's compensation claims. The principles

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44. Blaine v. Huttig Sash & Door Co., 232 Mo. App. 870, 105 S.W.2d 946 (St. L. Ct. App. 1937); Tabor v. Midland Flour Milling Co., 237 Mo. App. 392, 168 S.W.2d 458 (K.C. Ct. App. 1943).

45. 251 S.W.2d 49 (Mo. 1952).

upon which the courts base their decisions are well set out in *McCarthy v. American Car & Foundry Co.*[46] and *Lake v. Midwest Packing Co.*[47] These cases put forth the rule that injury or death resulting from heat stroke, exhaustion, or such, is compensable, as arising out of and in the course of employment, when the employee's place of work was such as to intensify the risk and subject employees to a greater hazard from heat than is common to the general public in the same locality. This is the normally applied test in Missouri.

5. Acts of God

Williams v. Great Atl. & Pac. Tea Co.[48] states the general rule relating to injuries resulting to an employee by reason of an act of God. An injury resulting from an act of God may be compensable, as arising out of employment, only if it is shown that the nature of the employment subjects the employee to hazards from forces of nature over and above those to which the general public is exposed.

6. The Problem of Resident Employees

A matter which seems to be arising with more frequency is that of injuries suffered by resident employees. The general rule, and that followed by Missouri,[49] is:

> When an employee is required to live on the premises, either by his contract of employment or by the nature of employment, and is continuously on call (whether or not actually on duty), the entire period of his presence on the premises pursuant to this requirement is deemed included in the course of employment. However, if the employee has fixed hours of work outside of which he is not on call, compensation is awarded usually only if the source of injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.[50]

Conclusion

It should be reiterated that each individual injury or act out of which the injury arises will be judged on the basis of its own particular facts. It should also be kept in mind that coverage under our Workmen's

46. 145 S.W.2d 486 (St. L. Ct. App. 1940).
47. 301 S.W.2d 834 (Mo. 1957).
48. 332 S.W.2d 296 (K.C. Ct. App. 1960).
49. Morgan v. Duncan, 361 Mo. 683, 236 S.W.2d 281 (1951).
50. 1 Larson, *op. cit. supra* note 2, at 372.

Compensation Law seems to be expanding as new problems are presented to the courts and old problems arise for reconsideration. This is a fluid area of the law, and one in which fine factual distinctions are necessarily drawn so that many reported cases will, at first glance at least, appear irreconcilable.

In closing, the author would like to make the following observation. Courts may well look differently at a case where the plaintiff is suing on a common law count of negligence against his employer and the defense raised is that workmen's compensation is the exclusive remedy, as opposed to a case where the employee attempts to bring himself under the compensation laws and the employer defends that the coverage does not extend to a particular case. It is the opinion of the author that courts favor the employee's chosen theory, whatever it may be.

In the negligence cases the only defense is often that workmen's compensation is the exclusive remedy, and if negligence is actually involved the courts turn down, as a general rule, the employer's defense and permit a common law recovery. On similar facts where workmen's compensation is sought and negligence is lacking, the courts often reason that workmen's compensation is the proper remedy and that as to the particular case an award may be made. It would seem then that the one seeking recovery should first pursue a common law case of negligence for there is a strong possibility that the court will favor the theory which he selects.