M E M O R A N D U M

TO: Senator Terry Stimson
Rep. Brian Rogers
FROM: Bob Williams
DATE: December 3, 1980
RE: Wage Loss Compensation

This memorandum analyzes Recommendation No. 1 in the report entitled (Identification and Elimination of the Causes of the High Cost of Worker's Compensation Insurance to Alaskan Employers, prepared by Richard L. Block & Associates, February, 1980) If Recommendation No. 1 is adopted, it will reduce the limit of maximum compensation allowed under AS 23.30.175.

Under Alaska's Comp law, wage loss due a claimant is 66 2/3 percent of their average weekly wage. However, that amount may not exceed the schedule under AS 23.30.175. Since January 1, 1979, maximum payable wage loss has been 166 percent of the State's Average Weekly Wage, or $654. On January 1, 1981, that maximum moves up to 200 percent of the State's Average Weekly Wage, or $780/week. The Department of Labor under AS 23.30.175 (b), is required to annually recompute the State's Average Weekly Wage. For 1980, it has been $393/week. The figure for 1981 is due by December 15, and will be approximatley $390/week, according to a spokesperson for the Deparmtent of Labor.

Under Recommendation No. 1 of the "Block Report", the schedule under AS 23.30.175(a) would be replaced. The new schedule would be;

> 66 2/3 percent of an employees average weekly wage up to 150 percent of the State's Average Weekly Wage, plus,
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> 40 percent of an employees wages between 150 percent and 200 percent of the State's Average Weekly Wage, plus,
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> 20 percent of wages between 200 percent and 300 percent of the State's Average Weekly Wage.

The effect of the "Block Proposal" is shown in Attatchment "A". The proposal does not affect employees who earn approximately $600/week, $589/week exactly, or less. What the proposal does do is place a cap on benefits of $550/week for any claimant

who earns in excess of $1,180/week. It also reduces the amount of compensation for wage loss between $589/week and $1,180/week, as the attatchment shows. The maximum of $550/week is less than the current maximum of $650/week, and will certainly be less than the estimated maximum for 1981, of $780/week.

ATTATCHMENT, "A" COMPUTATION OF COMPENSATION BENEFITS

Employees Average Weekly Wage	Gross Annual Income	Net Annual Income	Block's Proposal (weekly	annual)	Current Law 1980 (weekly	annual)	Current Law 1981 (weekly	annual)
$2,000	$96,000	$57,925	$550	$26,749	$650	$31,200	$780	$37,440
1,500	72,000	44,748	550	26,749	650	31,200	780	37,440
1,300	62,400	39,483	550	26,749	650	31,200	780	37,440
1,180	56,640	36,320	550	26,749	650	31,200	780	37,440
1,000	48,000	31,578	514	24,672	650	31,200	666	31,968
987	47,376	31,235	511	24,528	650	31,200	657	31,536
780	37,440	25,800	469	22,531	520	24,960	520	24,960
650	31,200	22,464	417	20,035	433	20,784	433	20,784
589								
500	24,000	17,880	333	15,984	333	15,984	333	15,984
300	14,400	11,372	200	9,600	200	9,600	200	9,600
100	4,800	4,740	66	3,168	66	3,168	66	3,168

6.25% Supp Benefits
4.25% PERS
2 dep w/deductions
paid monthly

Note) Net Annual Income is derived from the State Employee's witholding tax schedule. This table assume a married person with two dependents.

M E M O R A N D U M

TO: Senator Terry Stimson
Rep. Brian Rogers
FROM: Bob Williams
DATE: December 2, 1980
RE: Sec. 191 Benefits

This Memorandum deals with AS 23.30.191 entitled "Expenses for rehabilitating injured employees." The section reads,

> Sec. 23.30.191. Expenses for rehabilitating injured employees. An employee, who, as a result of injury, is or may be expected to be totally or partially incapacitated for his normal occupation and who, under the direction of the Department of Labor, is being rehabilitated to engage in a renumerative occupation and who is not entitled to further temporary total disability or temporary partial disability compensation, in addition to the amount allowed under sec. 40 of this chapter for maintenance, may recieve additional compensation necessary for his rehabilitation, not more than one-half of the compensation allowed under sec. 185 of this chapter. (2 ch 74 SLA 1963)

This law was passed in 1963; note the session law date. It was passed when there was a cap on payments for temporary total disability. Section 191 was originally enacted to encourage those no longer elgible for temporary total or temporary partial disability payments to particiapte in vocational rehabilitation. However, in 1975, the legislature removed the limit on temporary total disability benefits. That section now reads,

> Sec. 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 66 2/3 per cent of the injured employee's average weekly wages shall be paid to the employee during the continuance of the disability. (7 (2) ch 193 SLA 1959; am 4 ch 83 SLA 1975)

In other words, since 1975, temporary total disability payments are payable through the entire period of "disability." Finally, disability is defined under AS 23.30.265 (10). That sub-section reads,

> (10) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment;

The Division of Worker's Compensation claims that this section has created confusion. The crux of the problem appears to be this. If a person is in a rehabilitation program, it indicates that he is still disabled (See, AS 23.30.265 (10)). Otherwise he would be working. If he is disabled, as evinced by the fact that he needs rehabilitation, why should there be a provision in the law that reduces his benefits to one-half ? The Board, in most cases, has granted full temporary total disability benefits. However, it appears that a clear statement of benefits due a claimant in rehabilitation is in order. The Division of Worker's Comp has recommended the following.

> Sec 23.30.191. EXPENSES FOR REHABILITATING INJURED EMPLOYEES. An employee, who, as a result of injury, is or may be expected to be totally or partially incapacitated for his normal occupation and who, under the direction of the Department of Labor is being rehabilitated to engage in renumerative occupation (AND WHO IS NOT ENTITLED TO FURTHER TEMPORARY TOTAL DISABILTY OR TEMPORARY PARTIAL DISABILITY COMPENSATION, IN ADDITION TO THE AMOUNT ALLOWED UNDER AS 23.30.040. FOR MAINTENANCE,) may recieve (ADDITIONAL) compensation necessary for his rehabilitation, equal to 66 2/3 of his average weekly wage. (NOT MORE THAN ONE-HALF OF THE COMPENSATION ALLOWED UNDER SEC. 185 OF THIS CHAPTER.)

I would suggest that a spokesperson for the Division of Worker's Compensation discuss AS 23.30.191 with the Commission. It appears a clear statement of benefits due a person in vocational rehabilitation is in order.

THE SUPREME COURT OF THE STATE OF ALASKA

M-K RIVERS and ALASKA PACIFIC ASSURANCE CO., Appellants, v. ROBERT SCHLEIFMAN, Appellee.	File No. 3598 OPINION [No. 1911 - August 31, 1979]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: Charles P. Flynn, Burr, Pease & Kurtz, Inc., Anchorage, for Appellants. Robert Schleifman, in Propria Persona for Appellee.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Burke, and Matthews, Justices.

CONNOR, Justice.
MATTHEWS, Justice, dissenting, with whom BURKE, Justice, joins.

Robert Schleifman was injured in a motorcycle accident while traveling from the Sourdough pipeline camp, admittedly a remote site, to the bank in the city of Glennallen, about 30 miles away, to cash his payroll check. The question on appeal is whether the injuries he sustained en route are compensable under the Alaska Workmen's Compensation Act.[1]

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1. AS 23.30.005 - .270
The relevant provision in the determination of whether the injuries sustained in this case are compensable provides:

On Friday, July 16, 1976, Schleifman completed his workday and returned to camp with his work crew sometime before the regular quitting time of 4:30 p.m. He changed his clothes and left on his motorcycle for town, where the bank remained open late on Fridays, in order to cash his paycheck. Schleifman testified that he needed cash to use in traveling to Anchorage for his rest and relaxation leave, which was scheduled to begin the following Monday. After passing a car about two miles from camp, he was slowing down when he reached a corner which he was unable to negotiate. The motorcycle went off the road, resulting in serious injuries to Schleifman's legs.

On these facts, the Alaska Workmen's Compensation Board denied and dismissed Schleifman's claim for temporary total disability payments. Because the board found that the employment here in no way created the risk which resulted in the injury, it concluded that the injury was not within the course and scope of employment and, therefore, was not compensable. On appeal, the superior court reversed the board, finding that Schleifman was entitled to compensation.

Board denied claim

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1. (Continued)

"'[I]njury' means accidental injury or death arising out of and in the course of employment . . . ."

AS 23.30.265(13).

The standard of review that we employ with regard to decisions of the workmen's compensation board has been consistently reiterated:

> "[W]hile we will not vacate findings of the workmen's compensation board if supported by substantial evidence, our scope of review is not so limited where the board's decision rests on erroneous legal foundations."

Alaska State Housing Authority v. Sullivan, 518 P.2d 759, 760 (Alaska 1974); Hewing v. Alaska Workmen's Compensation Board, 512 P.2d 896, 898 (Alaska 1973); Ostrem v. Alaska Workmen's Compensation Board, 511 P.2d 1061, 1063 (Alaska 1973). Since the facts of this case are undisputed, the question before us is whether the law was applied properly to these facts. In these circumstances, the adequacy of conclusions of law is given "fresh consideration on appeal." W. R. Grasle Company v. Alaska Workmen's Compensation Board, 517 P.2d 999, 1003 (Alaska 1974).

The board denied relief because it concluded that Schleifman's employment had in no way contributed to the risk of injury. In reversing the board, the superior court interpreted the law to provide compensation for all injuries sustained within the duration of employment at a remote site. Therefore, the issue raised by this appeal concerns the proper application of the remote site injury doctrine. In our previous cases we have held that where an injury is sustained or death results while engaging in or incident to reasonable recreational activities at a remote site, it is compensable.

Anderson v. Employers Liability Assurance Corp., 498 P.2d 288 (Alaska 1972), involved an electrician-lineman employed at the remote site of Amchitka Island in the Aleutians. Food, lodging, a bar, and various recreational facilities were provided by the employer. While at the employer's bar, Anderson was induced by a wager with another employee to enter into a contest to determine which man could climb a transmission pole the most rapidly. Anderson fell and was injured during his attempt. We held that this was reasonable recreational activity under the circumstances and deemed his injuries covered by workmen's compensation. In explaining the remote site doctrine, we said:

> An outgrowth of these rules is the doctrine which has emerged in cases concerning resident workers on overseas construction projects, at isolated locations and at work premises which are relatively remote from the normal amenities of civilization. In an impressive number of cases compensation has been awarded for injuries occurring while the employee was pursuing recreational activities, even at locations not immediately adjacent to the job site or the living quarters. Although it is often possible for a resident employee in a civilized community to leave his work and residential premises to pursue an entirely personal whim and thereby remove himself from work-connected coverage, the worker at a remote area may not so easily leave his job site behind. The isolation and the remote nature of his working environment is an all encompassing condition of his employment. The remote site worker is required as a condition of his employment to do all of his eating, sleeping and socializing on the work premises. Activities normally totally divorced from his work routine then become a part of the working conditions to which he is subjected.

Id. at 290 (footnotes omitted) (emphasis added).

Under our statute, the concept of work connection establishes coverage. The test is that "if the accidental injury or death is connected with any of the incidents of one's employment, then the injury or death would both arise out of and be in the course of such employment". Northern Corporation v. Saari, 409 P.2d 845, 846 (Alaska 1966). In Saari the employer required employees to live at the remote work camp and had arranged for them to use the recreational facilities at a nearby military base. While returning from using the facilities, Saari fell off the road into a creekbed and fractured his skull. His accidental death was held to be an incident of his employment.

Although both Anderson, supra, and Saari, supra, involved injuries sustained in recreational pursuits, the remote site injury doctrine is not limited to such situations. Rather, it is a consistent application of the fundamental principles of the workmen's compensation system.[2] The underlying premise of this system is that liability is based upon the existence of an employment relationship, not upon a determination of culpability.[3] In return for the employee

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2. The social philosophy underlying workmen's compensation legislation is discussed in Searfus v. Northern Gas Company, 472 P.2d 966, 969 (Alaska 1970).

3. 1 A. Larson, The Law of Workmen's Compensation § 2.10, at 5 (1978), Fruit v. Schreiner, 502 P.2d 133, 141 (Alaska 1972).

giving up his right to sue the employer in the event that the employer was at fault in causing the injury, the system provides the employee with moderate assured benefits to compensate for loss of earning capacity, not for bodily injury. Therefore, the basic inquiry is whether the injury was substantially caused by, or the result of, the employment relation.

Injuries sustained by a temporary employee traveling between a remote worksite and his home were held incident to his employment in Department of Highways v. Johns, 422 P.2d 855 (Alaska 1967). In finding that the travel was a hazard of the employment, we relied on the special errand rule:

> "When an employee, having indentifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."

Id. at 860, quoting 1 A. Larson, The Law of Workmen's Compensation § 16.10 (1965).

In Johns we invoked the special errand rule because we found sufficient evidence to support an inference that the employee was to be compensated for his travel. However, the special errand rule will usually not be applicable in the absence of reimbursement, an express agreement, or some

other clear indication that travel is an integral part of the employment relationship. Although in the instant case the special errand rule does not apply, the employer did derive a benefit from having the employee living at the remote site.[4] The exigencies of the remote site situation, discussed above, require that a continuing employment relationship be found during Schleifman's trip to town.

Sourdough camp was a remote site requiring workers to live in the immediate area where they were going to perform their jobs. This residency requirement presents a special situation where certain reasonable activities must be deemed incidents of employment even though those same activities, if conducted at a non-remote site, might not be held to be work-related.[5] Driving from the Sourdough camp

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4. In O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 362, 13 L.Ed.2d 895, 898 (1965), the Court explained that federal law does not require "a causal relation between the nature of employment of the injured person and the accident", nor "is it necessary that the employee be engaged at the time of the injury in activity of benefit to the employer" to find an injury compensable. What is required is that "the obligations or conditions of employment create a 'zone of special danger' out of which the injury arose." The line is drawn only at those cases where an employee had become "so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment."

5. See generally Larson, The Positional Risk Doctrine in Workmen's Compensation, 1973 Duke L. J. 761. This position is in accord with the view recently expressed in Ahart v. Preload Co., 394 N.Y.S.2d 104 (N.Y. 1977), where the New York court said:

to Glennallen to cash one's paycheck is reasonably contemplated and forseeable by the employment situation. A risk inherent in that activity is that injuries could be sustained en route. Moreover, the trip was connected with some benefit to the employer. The employer paid Schleifman by check, rather than by cash, which was a convenience to the employer. Given the remote site, and the impending leave on the following Monday, it was expectable that Schleifman might travel to Glennallen for the purpose of cashing the check. Such an errand can be viewed as serving the mutual benefit of both the employer and the employee.[6] Given this

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5. (Continued)

> "It is well settled that an employee who is required to work far from home and who must remain in a particular locality for a period of time, may indulge in any reasonable activity and if he does so, the risks inherent in such activity are an incident of the employment." (citations omitted)

Ahart, supra, at 105.

6. This is what distinguishes this case from R.C.A. Service Company v. Liggett, 394 P.2d 675 (Alaska 1964). There compensation was denied to an employee who was killed while returning to his family home after completing work at the job site, where he normally lived. In the case at bar Schleifman's leave from the work site had not commenced. The accident occurred on a Friday, and his leave was to begin on the following Monday. See Dependents of Pacheco v. Orchids of Hawaii, 502 P.2d 1399 (Haw. 1972); Watson v. American Can Company, 261 N.Y.S.2d 306 (N.Y. App. Div. 1965). We do not base compensability in the case at bar solely on this consideration.

factor together with the remote situs of Schleifman's employment, it is our opinion that the trip was incident to Schleifman's employment. It follows that his injuries are compensable.

We affirm the decision of the superior court which reversed and remanded this case to the Alaska Workmen's Compensation Board.

AFFIRMED.

MATTHEWS, Justice, dissenting, with whom BURKE, Justice, joins.

There are here none of the employment related contacts which existed in our other remote site cases. Thus, in Northern Corporation v. Saari, 409 P.2d 845, 847 (Alaska 1966), "Saari was killed in the course of utilizing the recreational facilities at the air base which had been provided by Northern for the benefit and enjoyment of Saari and other employees." Anderson v. Employers' Liability Corp., 498 P.2d 288 (Alaska 1972), involved an injury to an on-call employee on the premises supplied by the employer. State Department of Highways v. Jonz, 422 P.2d 855 (Alaska 1967) involved an injury while the employee was traveling to work and was being compensated for the travel.

This case should be governed by RCA Service Co. v. Liggett, 394 P.2d 675 (Alaska 1964) where we reversed an award for an employee who was killed while flying home from a remote job site for private purposes. The majority opinion makes an effort to distinguish the RCA situation from the current one by noting that here Schleifman's "leave" from the work site had not begun while implying that the employee's leave had begun in RCA. Actually there is no important difference between the two cases. Schleifman was off work for the day and was free to spend his time until the next day as he saw fit. He chose to go to

Glennallen. Likewise the employee in RCA was through for the day and decided to fly to Fairbanks to spend the evening with his family. Like Schleifman, he was to report to work the next day.

The fact that Schleifman had intended to cash his pay check is of no relevance. The overwhelming majority of Alaskan employees receive pay checks and no doubt most of them travel to a bank or other business to cash them. To conclude that an injury suffered on such a trip is compensable stretches the course of employment standard beyond the breaking point. And there is nothing in the record indicating that Schleifman's trip on the public highway between Sourdough and Glennallen involved unique danger.

The two check cashing cases cited by the majority opinion do not support the proposition that an injury suffered while one is traveling to cash one's pay check arises out of and in the course of employment. The injury in the first case, Dependents of Pacheco v. Orchids of Hawaii, 502 P.2d 1399 (Hawaii 1972), occurred during a coffee break and thus falls within the so-called "coffee break exception" to the going and coming rule which ordinarily denies compensation for trips to and from work. See 1A Larson, Workmen's Compensation, § 15.54 (1978). In the second case, Watson v. American Can Company, 261 N.Y.Supp.2d 306 (N.Y. App. Div. 1965), the accident occurred during a

lunch break and there were special circumstances not present here. Larson says the following of Watson and another similar New York case:

> While the result in the two New York cases is defensible on the special facts of those cases, it is obvious that they cannot be taken to support a general rule that journeys to cash pay checks are in the course of employment. Any such extrapolation would quickly get out of hand, since trips might be taken at any hour of the day or night to almost any place where claimant happened to be able to cash checks.

Ibid. § 26.30, page 5-247.

For these reasons I would reverse the decision of the Superior Court and remand with instructions to reinstate the Board's decision.

THE SUPREME COURT OF THE STATE OF ALASKA

JAMES J. RIBAR, Appellant, v. H & S EARTHMOVERS, Appellee.	File No. 4505 O P I N I O N [No. 2205 - October 31, 1980]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, Judge.

Appearances: James A. Parrish, Parrish Law Office, Fairbanks, for Appellant. Michael C. Geraghty, Merdes, Schaible, Staley & DeLisio, Inc., Fairbanks, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Craske, Superior Court Judge. [Boochever, Justice, not participating].

MATTHEWS, Justice.

In this case, a disabled worker claims that diagnosis of a preexisting disease was delayed because symptoms of an on-the-job injury misled his attending physicians, causing them to misinterpret the significance of later symptoms of the preexisting disease. The worker claims that the portion of his disability caused by the

delayed diagnosis of the preexisting disease is compensable because of the on-the-job injury's alleged causal relationship to the delayed diagnosis.

James J. Ribar was employed by H & S Earthmovers [H & S]. While at work in Fairbanks, after dark on December 12, 1975, in heavy ice fog and with the temperature at -48°, he backed a vehicle he was operating into a truck. That night, after work and while driving to Anchorage, Ribar began to feel pain in his neck. The next day he filed a report of the on-the-job injury and visited a doctor at the Fairbanks Medical and Surgical Clinic [Clinic], who diagnosed "acute cervical strain syndrone [sic] severe." Ribar was treated with physical therapy, a neck collar, and pain medication. He was not permitted to return to work and continued to report to the doctor.

At the end of December, Ribar's condition had improved, but he had still not returned to work. By January 5, 1976, his pain was more severe, and his overall condition had worsened. By January 10, he was experiencing excruciating neck pain, numbness in the upper extremities, and muscle spasms. The diagnosis of cervical strain and the method of treatment were concurred in by another Clinic physician. On January 14, Ribar was admitted to the Clinic.

Ribar's condition continued to deteriorate. By January 16, he was unable to move his arms and legs and could not sit up by himself. The Clinic physicians continued to treat him for a severe cervical strain. Finally, on January 21, he was flown to Seattle for treatment at the University of Washington Hospital. A myelogram was performed; it showed a partial blockage in the cervical region of the spine. Surgery was performed on January 22 and a tumor, which had been constricting the spinal cord, was removed. Ribar was left a quadriplegic.

Ribar sought permanent disability compensation from the Workmen's Compensation Board [Board]. The Board found that the symptoms of the tumor had not been masked by the on-the-job injury and that therefore the injury was noncompensable.[1] It is evident that the Board used the word "masked" in the narrow sense of covered, rather than in the broader sense of confused. The Board stated:

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1. The Board stated:

> 15. We agree with the applicant's statement of the law that if the symptoms of applicant's cervical injury "masked" the more serious symptoms of a spinal cord compression, then the disability of the applicant is compensable. However, as previously stated, we believe the evidence indicates that the symptoms of spinal cord compression were not masked.

> What is at issue is whether the symptoms associated with a cervical strain "masked" the symptoms of the spinal tumor.
>
> At the hearing Dr. Mead was asked the specific question, if in his opinion the symptoms were "masked." He said "no." They may have been "confused" but they were not "masked."

The Superior Court, in affirming, agreed with the Board that masking in the sense of concealment was required, stating:

> Appellant argues, "If in fact the on-the-job injury misled claimant's physicians to his detriment, the detriment is compensable. This rule should obtain whether or not the failure to correctly diagnose the pre-existing informity [sic] might be labeled as 'malpractice'". . . . However, the inquiry is not whether the physician was misled. It is whether or not the symptoms were masked.

H & S argues that there was substantial evidence to support the Board's conclusion that the symptoms of the preexisting disease were not, in fact, obscured or concealed by the industrial injury. Ribar does not challenge the Board's findings, but simply says they are irrelevant. Furthermore, Ribar does not claim on appeal that any actual concealment of symptoms occurred.

The issue involved is essentially a causation question, says Ribar: Was the on-the-job injury a substantial factor which contributed to his quadriplegia? He contends that the Board improperly required him to establish

that the physical symptoms of his preexisting disease were obscured or concealed by the industrial injury. In fact, he says, all he needed to show was that the proper diagnosis was delayed because of the accident. H & S believes the theory advanced by Ribar, that a delayed diagnosis absent obscuring of the disease symptoms is compensable, is "wholly contrary to the policy behind workmen's compensation," inasmuch as it places the burden of the doctor's error on the employer.

The issue thus raised is a question of law. The Board rejected Ribar's theory of the case and as a result did not reach a determination regarding the facts which would control if his legal theory had been accepted.

Ribar cites an Oregon case, Waibel v. State Compensation Department, 471 P.2d 826 (Or. App. 1970), with remarkably similar facts in support of his legal position. In Waibel a worker was hit by a piece of timber, causing him to fall on his back against a log. Concussion and cervical strain were diagnosed. He returned to work with a back brace, but continued to feel back pain, and continued to visit a physician. Seven months after his on-the-job injury, a spinal tumor, resulting from Hodgkin's disease, was diagnosed. Waibel recovered compensation. The court reasoned:

> [T]he accident of August 4, 1966, and the symptoms which immediately followed it led the claimant and his attending physicians into believing that the symptoms he experienced from that time until March 11, 1967, were traumatic rather than the product of Hodgkin's disease. It seems probable that if the trauma had not "masked" the Hodgkin's disease symptoms Waibel would have received treatment for the disease at an earlier date. . . .

471 P.2d at 830.

H & S claims that Waibel is a case involving actual hiding of the underlying symptoms, and that it therefore cannot be read to support the broader theory of recovery suggested by Ribar. As phrased by the Oregon court, the question it faced was this:

> If the happening of an accident delays the diagnosis of a pre-existing disease with the result that the disease is not treated as promptly as it otherwise would have been, is the injured workman entitled to industrial accident compensation for the physical consequences of the delay in treatment for the disease?

471 P.2d at 827. It is impossible to determine from the Waibel opinion whether the Oregon court concluded that the injury symptoms must have actually obscured the disease symptoms. It does appear, however, that Waibel exhibited symptoms indicative of the disease and inconsistent with the injury prior to the time that the correct diagnosis was

made.[2] Thus Waibel supports Ribar's position.

We think that it makes little difference whether an industrial accident causes a delayed diagnosis of an underlying condition by actually concealing the symptoms of the condition or by merely causing confusion in the mind of the treating physician. In each case the condition is not discovered and appropriately treated because of the accident. The question in both cases is the same: was the accident a substantial factor in contributing to the applicant's condition in the sense that it delayed proper diagnosis and treatment of the tumor.[3]

H & S argues that acceptance of Ribar's theory will necessarily make employers liable for the consequences of medical malpractice. There are at least two problems with this argument. The first is that there is no testimony in this case that Ribar's physicians fell below the applicable standard of care owed by a doctor to his patient.

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2. Leaming v. State Accident Ins. Fund, 528 P.2d 1352 (Or. App. 1974) is not contrary authority, for there the fact of the industrial injury did not change the method of treating the claimant. In the present case, it is Ribar's position that his accident did cause his physicians to act differently than they would have had his accident not taken place.

3. See Ketchikan Gateway Borough v. Saling, 604 P.2d 590, 598 (Alaska 1979); Cook v. Alaska Workmen's Comp. Bd., 476 P.2d 29, 35 (Alaska 1970).

A physician may be wrong in a diagnosis without being negligent. Second, even if there was negligence, the general rule is that the consequences of medical negligence committed while treating a compensable injury are themselves compensable.[4] 1 A. Larson, The Law of Workmen's Compensation § 13.21 (1978); J. Stein, Damages and Recovery § 144 (1972); W. Prosser, The Law of Torts § 44, at 278-79 (4th ed. 1971).

The evidence presented on the question whether Ribar's accident was a substantial factor in bringing about his paralysis was conflicting.[5] This case must therefore be remanded to the Board for resolution of this question.

REVERSED AND REMANDED.

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4. The consequences of this rule are tempered somewhat by the fact that the employer is entitled to be reimbursed for compensation paid for injuries caused by the negligence of a physician. AS 23.30.015.

5. Drs. Mead and Harris thought the accident caused confusion and delayed a proper diagnosis; Dr. Rogers did not agree that the cervical strain had confused the treating physicians.

THE SUPREME COURT OF THE STATE OF ALASKA

CECIL H. KESSICK,

Appellant,

v.

ALYESKA PIPELINE SERVICE COMPANY and ALASKA PACIFIC ASSURANCE COMPANY,

Appellees.

File No. 4614

OPINION

[No. 2171 - October 3, 1980]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Millard F. Ingraham, Rice, Hoppner, Ingraham, & Brown, Fairbanks, for Appellant. Stephen Cramer, Merdes, Schaible, Staley and DeLisio, Fairbanks, for Appellees.

Before: Rabinowitz, Chief Justice, Connor, Boochever, Burke and Matthews, Justices.*

BURKE, Justice.

BOOCHEVER, Justice, dissenting.

In this appeal, Cecil H. Kessick, a claimant under the Alaska Worker's Compensation Act,[1] challenges a judgment of the superior court affirming the Worker's Compensation Board's denial of Kessick's claim for temporary total disa-

1. AS 23.30.005-.270.

*This case was submitted to the court for decision prior to Justice Boochever's resignation.

bility compensation.[2] Kessick maintains that the Board's decision was not supported by substantial evidence. We agree and order the decision reversed.

In April 1976, Kessick was employed by Alyeska Pipeline Service Company as a heavy equipment damage appraiser. On April 18, 1976, while examining some equipment at the Franklin Bluffs pipeline camp, Kessick was injured when he slipped and fell on some ice. At first he believed that he had merely bruised his knee. Over the next few days, however, the pain in his leg and lower back increased. He then consulted the camp medic who referred him to the Fairbanks Clinic. At the clinic, Kessick was examined by Dr. Edward Lindig, an orthopedic surgeon. Dr. Lindig originally diagnosed Kessick's injury as an acute lumbosacral strain and a possible herniated lumbar disc. Physical therapy and pain medication were prescribed. The next day, at Kessick's insistence, he was allowed to return to work. Unfortunately, his condition was such that he was unable to carry out his duties and he was forced to stop work and seek further treatment. With Dr. Lindig's encouragement, Kessick sought outside consultation in his hometown of Huntington, West Virginia. While in Huntington, Kessick had surgery for

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2. AS 23.30.155.

an inguinal hernia and underwent a number of studies, including a myelogram, on his injury. Although the results of the myelogram were negative, thus virtually ruling out the possibility of a ruptured disc, the studies did reveal some weakness in his right leg.

Upon his return to Fairbanks, Kessick was examined by Dr. Mead who diagnosed a femoral nerve stretch injury. Dr. Mead recommended that physical therapy be continued and warned that the healing period would be approximately six to nine months. After further examination, including repeated muscle strength tests, Dr. Lindig concluded that Kessick suffered from a lumboplexus stretch injury and not merely a femoral nerve stretch. He testified that this type of injury is notoriously slow to recover.

From May to early October 1976, Kessick underwent physical therapy three times a week as treatment for his injury. On October 10, 1976, Kessick was involved in an automobile collision in which he suffered further injuries. At the hearing, Kessick insisted that he had injured only his neck and head in the automobile accident. Dr. Lindig testified that Kessick had also injured his back, although only to a minor degree which rapidly subsided to its pre-automobile accident condition. As treatment for his additional injuries, Kessick's physical therapy was increased to six times a week. This additional treatment continued until

January 1977. In January, Kessick returned to his three day a week physical therapy schedule.

In early March of 1977, without consulting Dr. Lindig, Kessick flew from Fairbanks to Nunivak Island to participate in a musk ox hunt. Of the five days Kessick spent at the island, he went hunting only one. He spent most of that day lying on a foam pad in a sled which was towed by a snow machine. He estimated that he walked no more than a total of 150-200 yards the entire day.

Alyeska's compensation carrier, Alaska Pacific Assurance Company (hereinafter "ALPAC"), paid Kessick's medical expenses and total temporary disability benefits until April 21, 1977. These payments were then halted because of ALPAC's inability to reconcile Dr. Lindig's reports of continued temporary disability with Kessick's hunting trip and ALPAC's belief that the injuries sustained in the October automobile accident were the cause of the disability. On May 31, 1977, Kessick filed an application for an adjustment of his claim, contending that he was still suffering temporary total disability as a result of his April 18, 1976, fall. A hearing was held before the Alaska Worker's Compensation Board in Fairbanks on August 2, 1977. On January 25, 1978, the Board denied Kessick's claim on the grounds that he was no longer suffering any disability as a result of the April 1976 fall. Kessick appealed to the

superior court which affirmed the Board's decision on March 22, 1979. This appeal followed.

In reviewing the findings of the Worker's Compensation Board, the question before this court is whether or not the findings are supported by substantial evidence. Ketchikan Gateway Borough v. Saling, 604 P.2d 590, 593 n.8 (Alaska 1979). "Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a given conclusion." Id. That the Board's decision reflects only one of several possible inferences which could be drawn from the facts is not important; it is not the function of this court to reweigh the evidence but only to determine whether such evidence exists. Laborer's & Hod Carriers, Local 341 v. Groothuis, 494 P.2d 808, 811-12 (Alaska 1972); Wilson v. Erickson, 477 P.2d 998, 1002 (Alaska 1970).

The evidence before the Board consisted of Kessick's medical records and the testimony of Kessick and his treating physician, Dr. Lindig. Kessick testified that since his April 1976 fall he has suffered pain from his right knee to the base of his spine and that his leg is so weak that it occasionally gives out from under him. Dr. Lindig testified that, as a result of the April 18, 1976

accident,[3] Kessick suffered a lumbosacral plexus stretch injury which has resulted in persistent motor weakness in his right leg. Improvement had been gradual and steady but very slow over the past year. He further stressed that Kessick's case is "not considered medically stationary for ratings purposes yet. It is anticipated that it will still improve."

Despite this testimony, the Board concluded that "as of April 29, 1977, [Kessick] had returned to his pre-April 18, 1976, injury status." In making this determination the Board relied on the following factors: (1) The

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3. Prior to testifying, Dr. Lindig was apparently unaware that Kessick had sought treatment for similar pains just three weeks prior to his fall. However, upon being informed of this prior injury and after examing the notes of the doctor who had treated Kessick, Dr. Lindig reiterated his belief that Kessick's current injury resulted solely from his April 1976 fall. Nevertheless, the Board chose to disregard Dr. Lindig's uncontradicted testimony and found that the April 1976 fall had aggravated a pre-existing condition. Whether Kessick's fall was the sole cause of his injury or merely aggravated a pre-existing condition is not of crucial importance. In either event, the resulting injury is clearly compensable. See, e.g., Hawkins v. Green Assoc'd, 559 P.2d 118, 119 (Alaska 1977); Thornton v. Alaska Workmen's Comp. Bd., 411 P.2d 209, 210 (Alaska 1966). We do note, however, that in the absence of any competent contradictory medical evidence the Board's decision to disregard Dr. Lindig's testimony is inconsistent with the principle that inconclusive medical testimony is to be resolved in favor of the claimant. See discussion in the text infra.

Board believed that Kessick was exaggerating his claim[4] and that Dr. Lindig's diagnosis and treatment was based on this exaggeration; (2) Kessick's medical records disclosed that all objective testing, including a myelogram and electromyography, had been negative; (3) his right knee jerk, which he had lost as a result of his fall, had returned by October 29, 1976; (4) as of April 29, 1977, there was no longer any atrophy in his right leg; and (5) on July 27, 1976, Dr. Mead had estimated a recovery period of six to nine months. After a review of the record, we are unable to accept these factors as "substantial evidence" in support of the Board's conclusion that Kessick no longer suffered any ill-effects from his April 1976 fall.

The Board's decision to disregard Dr. Lindig's uncontradicted testimony is inconsistent with the general principle that any doubts concerning inconclusive medical

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4. This belief is based on two instances of apparently false testimony and Kessick's failure to consult with Dr. Lindig prior to engaging in the musk ox hunt. Although we have serious doubts about the propriety of disbelieving Kessick's testimony merely because he failed to consult his physician prior to engaging in a non-strenuous musk ox hunt, an activity which Dr. Lindig testified would have no adverse medical effects, we nevertheless feel that the decision was well within the Board's discretion as the trier of fact. It is well-settled that where a claimant testifies falsely in one instance the trier of fact may elect to disregard his otherwise uncontradicted testimony. Highway and City Transporation, Inc. v. Industrial Comm'n, 375 N.E.2d 83, 85 (Ill. 1978); 3 A. Larson, Workmen's Compensation Law § 80.20, at 15-396-399 (1976).

testimony are to be resolved in favor of the claimant. See, e.g., Miller v. ITT Arctic Services, 577 P.2d 1044, 1049 (Alaska 1978); Beauchamp v. Employees Liability Assurance Co., 477 P.2d 993, 996-97 (Alaska 1970). Where there is a conflict in testimony, it is undeniably the province of the Board and not this court to decide who to believe and who to distrust. Alaska Pacific Assurance Co. v. Turner, ___ P.2d ___, Op. No. 2067, at 10 n.8 (Alaska, April 25, 1980). But, as in Turner, that is not the situation presented by the case at bar. The only medical testimony presented to the Board, that of Dr. Lindig, was that Kessick was still temporarily disabled. Although the credibility of Dr. Lindig's diagnosis was questioned by the Board,[5] no contradictory medical evidence was presented. Given this lack of other competent medical evidence, the state of Dr. Lindig's testimony was, at worst, inconclusive. Id. Any doubts regarding this testimony should therefore have been resolved in Kessick's favor.

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5. The basis for the Board's distrust of Dr. Lindig's testimony was its belief that his diagnosis was based solely on Kessick's claims of pain and weakness, claims which the Board felt were exaggerated. Seemingly ignored by the Board was Dr. Lindig's testimony that his diagnosis was based on the notes from the camp medic and the results of repeated clinical examinations, including muscle evaluations by therapists, as well as what Kessick had told him.

Nor does the lack of objective signs of an injury in and of itself preclude the existence of such an injury. See Rogers Electric Co. v. Kouba, 603 P.2d 909, 911 (Alaska 1979). There are many types of injuries which are not readily disclosed by objective tests.

The Board's findings that Kessick's right knee jerk had returned and that there was no longer any atrophy in his right leg are also unpersuasive. Although these facts do indicate that Kessick was recovering, we believe that no reasonable person would infer that the effects of Kessick's injury had totally subsided, particularly in light of Dr. Lindig's testimony.

Finally, we believe that the Board's reliance on Dr. Mead's estimate of a six to nine month recovery period is misplaced. First, we do not believe that a reasonable person would accept as conclusive a nine-month old prediction that recovery would take approximately six to nine months when a subsequent diagnosis indicates that the patient has not yet recovered. Second, we note that Dr. Mead's estimate was based on his belief that Kessick was suffering from a femoral nerve stretch and not the lumbosacral plexus stretch injury which Dr. Lindig ultimately diagnosed.

Having determined that the Board failed to resolve inconclusive medical testimony in favor of the claimant and

that the record contains no other substantial evidence in support of the Board's conclusion that Kessick had recovered from his April 1976 fall, we are compelled to reverse.

REVERSED.

BOOCHEVER, Justice, dissenting.

I believe that there was substantial evidence to support the Alaska Workmen's Compensation Board's finding that after April 29, 1977, Kessick did not suffer any compensable disability from his April 18, 1976, injury. Evidence supporting the finding may be summarized as follows:

1. All objective testing was negative. Thus, determination of disability was based on subjective complaints.

2. As of April 29, 1977, there was no atrophy of Kessick's right leg. Kessick's complaint was that he had pain ascending from his knee to his spine and that his right leg was weak.

3. Kessick had prior back difficulties.

4. Kessick exaggerated his claim by denying his previous back difficulties, although when confronted with Fairbanks Clinic records he admitted he was receiving treatment for his back the month before his accident, in March, 1976.

5. When originally treated for an inguinal hernia in West Virginia, he attempted to attribute it to his April, 1976, fall, although that claim was later withdrawn.

6. In October, 1976, he was involved in a rear-end automobile collision. He claimed that only his head and

neck were injured without involvement of the low back. Dr. Lindig indicated that there was some injury to the low back.

7. On March 1, 1977, Kessick, without consulting his doctor, went on a musk ox hunt at Nunivak Island. He injured his right shoulder when the sled on which he was riding tipped over.

8. Dr. Lindig's report of Kessick's condition on April 29, 1977, was very similar to Dr. Berrick's report of March 29, 1976, prior to the accident, indicating that any aggravation of Kessick's prior back and leg disability had terminated.

It is true that the employer did not submit medical expert testimony, but this is not a case involving "highly technical medical considerations" such as those pertaining to the cause of renal failure at issue in Commercial Union Companies v. Smallwood, 550 P.2d 1261, 1267 (Alaska 1976) (footnote omitted), where we stated:

> While valid awards can stand in the absence of definite medical diagnosis, this would appear to be the type of case in which it is impossible to form a judgment on the relation of the employment to the disability without medical analysis.

The medical analysis here depended almost entirely on evaluating the history furnished by Kessick and his subjective complaints. This is the type of evidence in which a compensation

board has considerable expertise, as summarized by Professor Larson:[1]

> In line with the general tendency of administrative law to recognize the expertise of specialized tribunals, compensation boards may rely to a considerable extent on their own knowledge and experience in uncomplicated medical matters, and in such cases awards may be upheld without medical testimony or even in defiance of the only medical testimony.

Here, the Board was in the best position to evaluate the evidence. I would affirm.

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1. 3 A. Larson, Workmen's Compensation Law § 79 at 15-210 (1976). See also Beauchamp v. Employers Liability Assurance Corp , 477 P.2d 993 (Alaska 1970), where we upheld an award although it was not supported by clear medical evidence.

P. O. Box 1149 Juneau, Alaska 99811

GEORGE GIORDANO

Applicant

vs.

KA-SU CONSTRUCTION, INC.

Defendant

and

PROVIDENCE WASHINGTON INSURANCE

Carrier

DECISION AND ORDER

Case No. 75-06-0524

This matter came on for hearing before the Alaska Workmen's Compensation Board in Anchorage, Alaska, on December 20, 1977. Neither the applicant nor the defendant was present. Attorney William M. Erwin appeared for the applicant. Attorney Charles Hagans appeared for the defendant.

The matter is presented on the following stipulated facts:

1. The applicant was injured on the job and has a compensable claim.

2. His average weekly wage is $803.10.

3. Dr. Robert L. Grossheim has rated applicant's permanent partial disability to be 38 percent unscheduled.

4. Dr. Michael J. James has rated applicant's permanent partial disability to be 50 percent unscheduled.

5. The deposition of Dr. Michael J. James may be entered into evidence.

The purpose of this hearing, as set forth by counsel, is to have the Board determine the extent of applicant's permanent partial disability and how he shall be paid for it.

In addition to the above stipulated Findings of Fact, we make these additional

resulted because of the established $30,000 maximum, so effective May 22, 1975, 155(I) was repealed.

Effective August 31, 1977, an amendment to 190 re-established a maximum sum of $60,000 payable for unscheduled permanent partial disability; however, this was for permanent partial disability alone. Sums paid for temporary total disability were not included in the $60,000.

4. From the above it can be seen that at the time of applicant's injury there was no maximum applicable to the sum payable for unscheduled permanent partial disability. He is therefore entitled to receive 66-2/3 percent of the difference between his average weekly wage and his wage earning capacity after the injury, in the same employment or otherwise. Payment shall be made during the continuance of the partial disability but subject to reconsideration of the degree of the impairment by the Board on its own motion or upon application of a party in interest. Whenever the Board determines it is in the interest of justice, the liability of the employer may be discharged by the payment of a lump sum.

5. One other statutory provision must be considered in reaching our decision. This is set forth in AS 23.30.210(a) which is entitled "Determination of wage earning capacity" and reads as follows:

> In a case of partial disability under § 190(20) or 200 of this chapter the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

6. Based upon the information before us, it appears applicant cannot return to his former occupation. It also appears from the April 28, 1977, report attached to Dr. James' deposition that applicant's condition is essentially stabilized. It is planned for him to be retrained as a lab technician. Evidence concerning his motivation to return to work is conflicting.

1. Seldom, if ever, do disability ratings provided by doctors coincide. In the absence of a more precise method of calculation, the ratings are usually averaged. In the present case the average percentage of applicant's disability is 44 percent (50% + 38% = 88% ÷ 2 = $44%). We therefore find that applicant has a permanent partial disability of 44 percent, unscheduled.

2. AS 23.30.190 is entitled "Compensation for permanent partial disability." At the time of applicant's injury, it read as follows:

> In case of disability partial in character but permanent in quality the compensation is 66-2/3 per cent of the injured employee's average weekly wages in addition to compensation for temporary total disability or temporary partial disability paid in accordance with secs. 185 or 200 of this chapter, respectively, and shall be paid to the employee as follows:

Following this the amounts payable for scheduled injuries are enumerated. Subsection (20) of 190 provides that:

> In all other cases in this class of disability the compensation is 66-2/3 per cent of the difference between his average wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability, but subject to reconsideration of the degree of the impairment by the board on its own motion or upon application of a party in interest; whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;

3. Prior to the date of applicant's injury AS 23.30.155(l) provided in effect that the total sum payable for temporary total disability and permanent partial disability unscheduled, combined, could not exceed $30,000. The usual method of calculating compensation for unscheduled permanent partial disability was to multiply the $30,000 maximum by the percentage of disability. Thus if one had 50 percent permanent partial disability unscheduled, he would receive $15,000 provided that he had not already received in excess of $15,000 for temporary total disability. If he had received more than $15,000 for temporary total disability, he would receive the difference between what he had been paid for temporary total disability and $30,000.

The legislature was apparently convinced that in certain cases inequities

7. All things considered, we find at the present time that applicant has sustained a 44 percent reduction in his earning capacity. This figure may change in the future. If it does, we will entertain a petition to recalculate.

As it stands now, we conclude applicant is entitled to receive $235.55 per week as compensation for permanent partial disability. This is computed as follows: Applicant's average weekly wage is $803.10. He has a 44 percent loss of wage earning capacity which, reduced to dollars, amounts to $353.36 ($803.20 x .44 = $353.63). He is entitled to 66-2/3 percent of $353.63, which is $235.15.

ORDER

Applicant's rate of compensation for permanent partial disability unscheduled is $235.15 per week.

Dated at Juneau, Alaska, this 24th day of April, 1978.

ALASKA WORKMEN'S COMPENSATION BOARD

S/ Earl J. Turner
Earl J. Turner, Chairman

S/ Catherine C. Ringstad
Catherine C. Ringstad, Member

S/ Jim Robison
Jim Robison, Member

Compensation payable under terms of this decision is due on the 14th day after the date of issue, and penalty of 20 percent will accrue if not paid within 14 days of the due date unless excused by the Board for reasons beyond the control of the defendant or unless interlocutory injunction staying payment is obtained in Superior Court.

APPEAL PROCEDURES

A compensation order may be appealed through proceedings in the Superior Court brought by a party in interest against the Board and all other parties to the proceedings before the Board, as provided in the Rules of Appellant Procedure of the State of Alaska.

A compensation order becomes effective when filed in the office of the Board, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of George Giordano, applicant; vs. KA-SU Construction, Inc., defendant; and Providence Washington Insurance, insurance carrier; Case No. 75-06-0524; dated and filed in the office of the Alaska Workmen's Compensation Board at Juneau, Alaska, this 24th day of April, 1978.

Bonnie L. Stewart
Clerk Typist

Juneau, Alaska 9981

GIORDANO

Applicant

vs.

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Carrier

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The purpose of this hearing, as set forth by counsel, is to have the Board determine the extent of applicant's permanent partial disability and how he shall be paid for it.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Seldom, if ever, do disability ratings provided by doctors coincide. In the absence of a more precise method of calculation, the ratings are usually averaged. In the present case the average percentage of applicant's disability is 44 percent (50% + 38% = 88% ÷ 2 = \$44%). We therefore find that applicant has a permanent partial disability of 44 percent, unscheduled.

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7. All things considered, we find at the present time that applicant has sustained a 44 percent reduction in his earning capacity. This figure may change in the future. If it does, we will entertain a petition to recalculate.

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Dated at Juneau, Alaska, this 24th day of April, 1978.

ALASKA WORKMEN'S COMPENSATION BOARD

S/ Earl J. Turner
Earl J. Turner, Chairman

S/ Catherine C. Ringstad
Catherine C. Ringstad, Member

S/ Jim Robison
Jim Robison, Member

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CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of George Giordano, applicant; vs. KA-SU Construction, Inc., defendant; and Providence Washington Insurance, insurance carrier; Case No. 75-86-0528; dated and filed in the office of the Alaska Workmen's Compensation Board at Juneau, Alaska, this 24th day of April, 1978.

Doreen L. Stewart
Clerk Typist

§ 24. RESIDENT EMPLOYEES

§ 24.00 When an employee is required to live on the premises, either by his contract of employment or by the nature of the 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 course of injury was a risk associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

§ 24.10 General resident-employee rule

It has already been shown, in the case of employees with fixed time and place of work, that such personal activities as eating lunch[1] or indulging in recreation[2] are within the course of employment even when they take place outside strict working hours, if they take place on the employment premises. It has also been shown that all kinds of personal comfort activities within working hours on the premises are covered.[3] It is possible, by an extension of this same idea, to say that when a worker is on the premises night and day all his personal comfort and incidental activities are within the course of employment, including sleeping at night. When the employee is on call at all hours, the reason for this broad coverage is strengthened, since then the position may be analogized to that of an employee who is on duty and paid during his lunch period or rest interval. When the employee is not on call at all times, there is still an analogy in the rules for fixed-hours workers, for even the latter, while *on the premises*, are covered

[1] See § 21.21 *supra*.

[2] See § 22.11 *supra*.

[3] See § 21.30 to § 21.70 *supra*.

outside of their working hours while engaged in eating,[4] recreation,[5] going and coming,[6] washing,[7] and the like.

If a summary of the current state of the law in this entire area were to be attempted, the following would probably come as close to the mark as any condensed statement could:

Injuries to employees required to live on the premises are generally compensable if one of the two following features is present: either that the claimant was continuously on call, or that the source of injury was a risk distinctly associated with the conditions under which claimant lived because of the requirement of remaining on the premises.

Some jurisdictions go further, some not so far; but this brief statement describes the rule that emerges from the bulk of the decisions.

§ 24.20 Employees continuously on call

§ 24.21 Broad rule covering on-call employees

A domestic servant on 24-hour duty in the employer's house or any other location, working continuously on the premises and continuously on call,[8] may be thought of as occupying the

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[4] See § 21.21 *supra*.

[5] See § 22.11 *supra*.

[6] See § 15.10 *supra*.

[7] See § 21.62 *supra*.

[8] This type of problem should be distinguished from that of the employee who does some part of his work at home or even maintains an office at his own home. See § 18.30 to § 18.34. Obviously the course of employment for such a worker cannot be extended to all the personal and domestic acts around the house connected with the employee's private life. Johnson v. Local 59, Tile & Marble Helpers, 18 A.D.2d 955, 237 N.Y.S.2d 814 (1963). A union business agent maintained the union office in his home. Injuries suffered while returning to yard work, after being interrupted by a business phone call, held not compensable.

Cf. Graham-Michaelis Drilling Co. v. Atkins, 397 P.2d 658 (Okla. 1964). Deceased employee was furnished with company car, had office in his home,

same position as an eight-to-five worker while present on his employer's premises. The great majority of jurisdictions therefore make awards for injuries in all the familiar categories of activity which have been found to be in the course of employment when undertaken on the premises during working hours by employees having a fixed time and place of work.

Going and coming trips on the premises are covered, as when a nurse, who was off duty but was required to remain on the grounds, fell on the ice while walking between the hospital and the home.[9] Going to and coming from meals would similarly be in the course of employment.[10]

Most of the varieties of personal comfort activity are represented among the on-call resident employee cases. As to eating, it has been held that a nun who fell while fixing her own breakfast at the convent was within the course of her employment.[11] Going to the bathroom has consistently been held to be

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and was on 24-hour call. He suffered a heart attack while shoveling snow from around the car. Compensation was upheld.

[9] Favorite v. Kalamazoo State Hosp., 238 Mich. 566, 214 N.W. 229 (1927).

[10] Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962). A resident practical nurse lived on the premises of the County Home. She slipped and fell on the sidewalk between the nurses' residence and the main building where she planned to have breakfast before reporting to work. The court held that the "premises rule" applied to the resident employee.

See also Wood v. New York State Dep't of Environmental Conservation, 361 N.Y.S.2d 751 (App. Div. 1974). The customary practice for employees was either to eat lunch on the premises or to go off the premises for lunch. The decedent employee, an inside employee, was in charge of the premises along with his supervisor, who left the decedent in charge while he went for lunch. The supervisor testified that he informed the decedent that, if he wished, the decedent could simply lock up while he went for lunch. He also testified that the decedent customarily went across the highway to a small store for lunch. The court reversed the board and held that the decedent was in the course of his employment when he was killed on the highway which fronted on the employer's premises during the lunch period. When an inside employee is on duty during lunch, the fact that he is off the premises at the time the injury occurs is not controlling.

commencing work,[12] an apartment house superintendent's wife, who was a "joint superintendent,"[13] a dressmaker who remained on the premises overnight,[14] a resident jail matron,[15] and a hospital nurse.[16] Injuries while bathing are a familiar source of awards, to such claimants as a hotel dishwasher, off duty but on call, who was injured while taking a shower,[17] a handyman on an estate who cut his foot taking a bath,[18] an on-call hotel cook who fell while taking a shower,[19] and a receptionist in a funeral parlor, living on the premises, who slipped while leaving the bathtub to answer the phone.[20] Case of appearance and dressing categories are represented by awards to a cook who suffered an unexplained fall while dressing in the morning;[21] a cook in a private residence who

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[11] Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

Insurance Co. of No. America v. Estep, 501 S.W.2d 352 (Tex. Civ. App. 1973). An employee of a cotton gin was assaulted by a fellow employee while preparing his meal on premises on which complainant was on call 24 hours a day as a condition of his employment. The injury was held to have arisen in the course of employment. An injury in such a situation need not occur while the employee was discharging any specific duty of his employment.

[12] Underhill v. Keener, 258 N.Y. 543, 180 N.E. 325 (1931).

[13] Tinnelly v. Schrumpf, 278 App. Div. 992, 106 N.Y.S.2d 71 (1951).

[14] Jasnig v. Winter, 115 N.J.L. 320, 179 A. 884 (1935), *aff'd without opinion*, 116 N.J.L. 181, 182 A. 842 (1936).

[15] Behan v. County of Onondaga, 26 A.D.2d 609, 271 N.Y.S.2d 361 (1966). Claimant worked as head matron in the county jail. In addition to her salary, she received a room on the premises and board, and was subject to 24-hour call. She was injured when she slipped as she was coming out of the bathroom at 2 A.M. Because she was required to live on the premises, the injury was held compensable.

[16] Doyle's Case, 256 Mass. 290, 152 N.E. 340 (1926).

[17] Taylor v. 110 So. Pa. Ave. Corp., 117 N.J.L. 346, 188 A. 689 (1936).

[18] Bruyere v. Walker, 7 N.J. Misc., 716 (1929).

[19] Weiss v. Friedman's Hotel, 176 Pa. Super. 98, 106 A.2d 867 (1954).

[20] Brandner v. Myers Funeral Home, 330 Mich. 392, 47 N.W.2d 658 (1951).

[21] Martin v. Plaut, 293 N.Y. 617, 59 N.E.2d 429 (1944).

was injured in her own room while engaged in shortening a street dress and standing on a stool to observe the hem of the dress in a wall mirror;[22] a hospital clerk, on call at all times, who fell from a chair while he was dressing after taking a bath;[23] a funeral home custodian who was injured while changing a dress that had become soiled;[24] a live-in 24-hour-on-call employee fell on the premises on the way to a laundromat to do his personal laundry;[24.1] and a domestic servant who washed her hair once a fortnight with the approval of her mistress and was burned when she fell into a fire while drying her hair.[25] Awards associated with sleeping and resting include awards for injuries while going to bed, as in the case of a claimant who was employed by his father as a chauffeur and companion on continuous call and who fell going upstairs to bed;[26] while getting up in the morning, as in the case of a domestic servant who fell out of the window when opening it after arising in the morning;[27] while getting up in the night, as in the case of a maid and companion for a disabled employer who, at a time when she was suffering from a heavy

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[22] Employers' Liab. Assur. Corp. v. Industrial Acc. Comm'n, 37 Cal. App. 2d 567, 99 P.2d 1089 (1940).

[23] Wood v. Kings Park State Hosp., 266 App. Div. 804, 41 N.Y.S.2d 391 (1943), *aff'd*, 293 N.Y. 919, 60 N.E.2d 129 (1944).

[24] Gowan v. Harry Butler & Sons Funeral Home, 204 Kan. 210, 460 P.2d 606 (1969). Claimant and her husband were provided with an apartment on the premises of her employer, a funeral home. Her duties included light housekeeping, answering the phone, and meeting people who came to the door; one of the specific requirements of her employment was that claimant be neat and presentable at all times. While cleaning, claimant spilled some polish on her dress, and, after returning to her apartment, was injured while changing her dress. A denial of benefits was reversed, the court holding that in changing her dress claimant was fulfilling one of the conditions of her employment.

[24.1] Adair v. Metropolitan Building Co., 196 N.W.2d 335 (Mich. App. 1972). **Treatise** quoted.

[25] Codling v. Ridley, 26 B.W.C.C. 3 (1933).

[26] Wiarda v. Wiarda, 281 App. Div. 999, 120 N.Y.S.2d 509 (1953).

[27] Cooney v. Roper, [1939] Ir. Jur. Rep. 29 (1939).

ally sleeping, as in the cases of resident caretakers burned by an accidental fire,[28] or injured by a runaway bulldozer which rammed the rental unit occupied by the caretaker.[29] Recreational and social activities of resident on-call workers are extended a generous degree of coverage, in recognition of the special circumstances under which these employees live and must obtain their entertainment and recreation. The compensation act has been held to apply to a cook in a summer resort, who lived in a cottage furnished by the employer, who fell on the steps of a co-employee's cottage while returning a book during a rest period;[30] to a kitchen helper, who lived on the premises, who had completed his week's work but was on call in emergencies, and who fell on the stairs at 11 P.M. while re-

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[28] Outlaw v. Parker, 9 A.D.2d 797, 192 N.Y.S.2d 692 (1959). Her duties required her to sleep on the premises and be available for calls during the night. The court said:

"[A]mong others, the risk of tripping or slipping in one's room or out of it, and where the servant lives in as part of the household, such incidents may be said to arise out of and in the course of employment. . . . The fact that here the claimant was suffering from a cold which apparently necessitated her arising during the night is not such an unusual circumstance as to deny her compensation." 192 N.Y.S.2d 692, at p. 693.

[29] Scott v. Hoage, 63 App. D.C. 391, 73 F.2d 114 (1934).

Bourn v. James, 191 Neb. 635, 216 N.W.2d 739 (1974). Claimant was a ranch hand for the employer. He lived in a small trailer owned by the employer, and on the employer's land. In the middle of the night, he suffered injuries in the trailer in a fire. The claimant was not required to live in the trailer as a condition of employment, but it was contemplated by both employer and employee that he would do so, so as to be able to help with cows in the middle of the night if the occasion arose. The court held that the injury arose out of his employment. The test used by the court was whether the act at issue was reasonably incident to his employment, or whether it was so substantial a deviation as to constitute a breach in the employment and create an independent hazard. There was a clear benefit to the employer in having claimant stay on the premises, and it was incident to his employment as a caretaker and laborer at the ranch. Moreover, the claimant had no fixed hours, and was "on call" at the time of the injury.

[30] Madin v. Industrial Acc. Comm'n, 46 Cal. 2d 90, 292 P.2d 892 (1956).

[31] Caney v. Straight, 274 App. Div. 1077, 85 N.Y.S.2d 626 (1949).

turning from a visit on the same premises with a co-worker;[32] to a combination saleslady and beauty parlor operator aboard a passenger ship, who had no regular hours of work and was subject to call at any time that passengers wanted to purchase merchandise, who fell because of the roll of the ship when trying to rise from a reclining position after sun bathing on the sun deck in a bathing suit;[33] to a night watchman who was asphyxiated while watching television;[34] and to a student nurse, subject to emergency calls, who during her day off was killed by a fire in the nurses' home while she was addressing Christmas cards.[35] Various domestic chores, appropriate to the situation of on-call resident workers, have been held covered, as when a janitor of a tenement house, on call 24 hours a day, was disfigured when the polish she was using to clean a stove in her own rent-free apartment exploded;[36] or when a falling cabinet injured a superintendent's wife while she was mopping up in her own kitchen as the result of a water pipe leak;[37] or when an on-call employee, who [illegible] in a company-

[32] Lewis v. River Crest Sanitarium Co., 277 App. Div. 914, 99 N.Y.S.2d 65 (1950), *aff'd*, 302 N.Y. 655, 98 N.E.2d 474 (1951).

[33] Rosenquist v. New Amsterdam Cas. Co., 78 So.2d 225 (La. App. 1955).

[34] Rocky Mountain Tank & Steel Co. v. Rager, 423 P.2d 645 (Wyo. 1967). Decedent worked as a night watchman, and lived in a house on the premises. His duties were intermittent during the night, and included answering a business phone in his house, locking gates, and cleaning up. He was asphyxiated while watching television in his house, at night, while dressed in his working uniform. Award of death benefits affirmed.

[35] Carraway Methodist Hosp. Inc. v. Pitts, 256 Ala. 665, 57 So.2d 96 (1952). An action under the homicide statute for death was barred because of exclusiveness of the compensation remedy.

[36] Kosma v. Blau, 12 A.D.2d 542, 206 N.Y.S.2d 751 (1960).

[37] Brooks v. Dee Realty Co., 72 N.J. Super. 499, 178 A.2d 644 (1962). A water pipe leak had flooded the superintendent's kitchen and caused structural damage in the walls. A jury verdict of $4000 damages to Mrs. Brooks was reversed by the Superior Court because of the exclusive remedy under the Workmen's Compensation Act. While the mopping was partially personal in cleaning her own kitchen, it was also employment-related as necessary to prevent further leakage into the apartment below. The court followed the "but for" doctrine as to "neutral risks." Treatise quoted.

on Sunday to pick up a water filter to install in the home;[38] or when a nurse at a state school fell on the steps while carrying in groceries for his personal use;[39] or when an employee, who lived in a house provided by his employer so that he would be available for 24-hour duty, on his last day of work was told to go home and pack, and was injured while packing;[40] or when an isolated resident employee on call at all times was killed while driving back down a mountain after repairing a television antenna;[41] or when a district game supervisor was killed

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[38] Elliot v. Delmont Fuel Co., 183 Pa. Super. 13, 127 A.2d 777 (1956).

[39] *In re* Kilcoyne's Case, 352 Mass. 572, 227 N.E.2d 324 (1967). Employee worked as a nurse at a state school. He lived on the premises, and paid $1.54 a week for his room. He was injured on an off day, when he tripped on the steps while carrying some of his own groceries up the steps of the school. The court found that the employer received some advantage from the employee's living on the premises, and that although living on the premises was not required, the employees had to fill in when another employee was absent, and the realities of the employment made living on the premises necessary. Therefore, the injury was compensable.

[40] Maley v. Chisholm, 3 A.D.2d 615, 158 N.Y.S.2d 41 (1956).

Cf Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966). Claimant, a minister, lived in a house supplied by the employer church, and used for many church functions. Claimant was assigned to another church, and to enable the defendant to make repairs to the parsonage, he agreed to move two weeks prior to the termination of his employment with them. While moving a stove he injured his back. The court held that the work being performed was personal and not connected with claimant's employment as a minister. Compensation denied.

Cf. also Fingers v. Mount Tabor United Church of Christ, 439 S.W.2d 241 (Mo. App. 1969). Claimant worked as a custodian in a church, was on call 24 hours a day, and was required to live in a house on the church premises, the use of which he received as part of his remuneration. One evening after completing his church activities he returned to his residence and started to go to the basement to select a place to store his old refrigerator. While walking down the steps he tripped and was injured. The requirement that claimant live on the premises and be on call was held not sufficient to make any injury suffered on the premises compensable, and since the activity in progress at the time of injury was purely personal, compensation benefits were not payable. **Treatise** quoted.

[41] Game & Fish Dep't v. Pardoe, 147 Colo. 363, 363 P.2d 1067 (1961). The

fixing the television wiring in a cottage provided by his department on a game reserve.[42]

The last two cases cited provide a reminder of the close link between this type of case and the cases in which the isolated, remote or unusual character of the place where the employee is brought by his employment, either as a resident but not on-call worker,[43] or as a traveling employee,[44] is relied on the extend the range of covered recreational or other incidental activities. The same principle is at work, whether the employee is on the staff of a mountain resort, or in a troupe of traveling camp show entertainers in Paris, or on assignment in a troubled part of the Middle East; and therefore it would be perfectly appropriate to invoke the rapidly-developing precedents from these other fields to enrich the fund of authority available when on-call employees are in residence in comparably remote, lonely, or exotic places.

Once the basic course of employment elements are found, the employee would ordinarily have the benefit of the same rules on causal relation that would apply in similar circumstances to an employee with fixed hours and place of work. A jurisdiction which accepts the concept of positional risk or neutral risk can readily make an award, for example, to a resident caretaker when the source of harm was a bulldozer which had been started by some boys in the neighborhood and which ran wild, smashing into the room where the caretaker was sleeping.[45] By the same token, under the identification of

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court stated that TV entertains isolated employees and indicated the importance of resident employees at isolated or semi-isolated places. **Treatise** quoted.

[42] Wheeler v. State Dep't of Conservation, 350 Mich. 590, 87 N.W.2d 69 (1957). Part of deceased's work included preparation of and participation on educational programs and it was his duty to remain abreast of such programs.

[43] See § 24.30 *infra.*

[44] See § 25.23 *infra.*

[45] Madin v. Industrial Acc. Comm'n, § 24.21 N. 30 *supra.* See also Brooks v. Dee Realty Co., § 24.21 N. 37 *supra.*

award like that in *Mortis v. Pleat*,[46] when the cook who fell while dressing in the morning simply did not know why she fell. Moreover, if the claimant is generally within time and space boundaries associated with his employment, the fact that the particular trip on which he fell cannot be affirmatively identified with employment purpose should not ordinarily be fatal to the claim. Thus, compensation was awarded to a caretaker of a two-family house who fell down the stairs while answering the door for an unknown caller.[47]

§ 24.22 Limitations on on-call coverage

When compensation has been denied to employees in this category, it has usually been on the theory that the activity was too distinctly personal to support an award. For example, awards have been refused for injuries when a watchman was asphyxiated as a result of preparing tea for himself on a gas plate;[48] when a caretaker of an apartment had an identical misfortune while preparing coffee;[49] when a watchman[50] and a janitor[51] set fire to themselves apparently by smoking in bed.

These cases are difficult to reconcile in principle with the sucessful cases listed above. It has been observed in the treat-

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[46] § 24.21 N. 21 *supra*.

[47] Mowen v. Chase Nat'l Bank, 277 N.Y. 135, 13 N.E.2d 607 (1938).

Esperance v. Church of St. Anthony Padua, 281 App. Div. 789, 118 N.Y.S.2d 606 (1953). Decedent lived and taught at the convent and was injured when she fell on the stairs of the convent. The opinion does not state what she was doing at the time of the injury. Compensation awarded.

[48] Comm'r of Taxation & Fin. v. Fure, 264 N.Y. 678, 191 N.E. 623 (1934).

[49] Meehan v. Marion Manor Apartments, 305 Mich. 262, 9 N.W.2d 534 (1943).

[50] Pisko v. Mintz, 262 N.Y. 176, 186 N.E. 434 (1933).

[51] McKenna v. Atlas Contractors Equip. Corp., 275 App. Div. 876, 88 N.Y.S.2d 668 (1949), *rev'd*, 300 N.Y. 317, 90 N.E.2d 479 (1950), reversed on the facts a denial that had been based on the theory that the deceased watchman had caused the fire by smoking in bed.

ment of personal comfort activities generally that smoking and eating and preparing food are in the same category as resting, going to the toilet, bathing and attending to personal appearance.[52] If the janitor in *Pisko v. Mintz*[53] was on call at the time when he was smoking, his case seems little different from that of claimant in *Puffin v. General Electric Company,*[54] who set fire to herself while smoking during a rest period in a factory. And if the watchman in the *Fure* case,[55] was on call when making tea for his own refreshment, his case seems no different from that of the claimant in the *Goodyear* case,[56] who was injured while preparing to cool a bottle of cola for his lunch.

On the other hand, a line must be drawn in these cases somewhere short of unlimited coverage of everything that happens on the premises. In *Loyola University v. Industrial Commission,*[57] claimant was a dishwasher and kitchen helper employed by the university. He had certain working hours, but was to some extent on call at other times. He lived in a room in the university powerhouse, which was provided as part of his pay. The University wanted him to live on the premises so that he would be more readily available. On the morning of the accident, the claimant was just "walking around, killing time." It was 6:20 in the morning, and his duties did not commence until 10:30. While he was wandering about, he fell from a wall in back of the powerhouse, at a point which was not on his route from his lodgings to his place of work, nor to any other place where his duties might take him. Compensation was denied. The court said:

" . . . it is clear that the act of walking around 'killing

[52] See § 21 *supra.*

[53] N. 50 *supra* this subsection.

[54] 132 Conn. 279, 43 A.2d 746 (1945), discussed in § 21.40 *supra.*

[55] N. 48 *supra* this subsection.

[56] Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945), discussed *supra* in § 12.33 and § 21.30.

[57] 408 Ill. 139, 96 N.E.2d 509 (1951).

time' on an inclined ramp four hours before the employee's regular duties commenced was not an act reasonably contemplated by the contract of employment. Plainly stated, Drohan was a dishwasher, and, so far as his employment was concerned, he had no reason to be on the narrow protective wall running along the edge of the coal ramp eight or nine feet in height at the back of the powerhouse. The ramp was not a part of the premises which would reasonably be used in going to or from the second floor of the building where he lived."[58]

This decision is not necessarily inconsistent with the principles applied in the successful cases above. When awards have been made, the employee has usually been engaged in some activity of the general personal-comfort or going-and-coming type—dressing, bathing, resting, or perhaps visiting co-employees—while in the present case, the claimant's wanderings bore no relation to any such activity.[59]

§ 24.23 On call but off premises

Although an employee is continuously on call, an injury off the premises in the course of a personal activity is not ordinarily considered to be within the Compensation Act. This rule has been applied to the basic going and coming trip,[60] to a

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[58] 96 N.E.2d 509, at p. 514.

[59] Note also that in this case, unlike the successful cases in § 24.21 N. 47 *supra*, in which the exact nature of the claimant's errant at the time of his fall was not known, all the evidence is such as to disassociate the activity from any conceivable employment connection.

[60] *Federal:* Foster v. Massey, 407 F.2d 343 (D.C. Cir. 1968). Claimant was employed by a bus company on an on-call basis, and was required to be available at home or to leave word where he could be reached or call in often in order to be available to make trips for the bus company. He was injured while driving to report to work pursuant to a call from the employer. Claimant was guaranteed payment for a minimum number of miles driven each week, regardless of whether they were driven or not, a guarantee which was not given to regular drivers. The court held that the lower court was not required to find that this guarantee was in effect pay for the travel time or claimant's availability to work, nor was there any other exception to the

trip to church,[61] and to various other personal errands.

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coming and going rule which would require an award of compensation, since the employer did not control the trip to work, nor was this a special award.

Alabama: Russellville Gas Co. v. Duggar, 260 So.2d 393 (Ala. App. 1971). Claimant drove a liquid petroleum gas truck. He was on call 24 hours per day, and took his truck home with him, for use in the event a night delivery or weekend delivery had to be made. He was injured while walking from his house to the truck, which was parked in his yard, in preparation to report for work. The lower court apparently awarded compensation on the basis that, because the truck was kept at home, the claimant's home became the premises of the employer. The appellate court reversed, holding that under the facts, the claimant was in no different situation than any employee preparing to go to work in the morning by his usual means of transportation, and the injury was not compensable.

Arkansas: Thornton v. Texarkana Cotton Oil Corp., 219 Ark. 650, 243 S.W.2d 940 (1951). Building superintendent, subject to call at any time, injured on journey home. Court stated that under the going-and-coming rule it "makes no difference whether he works regular hours, or is subject to call by employer." Compensation denied.

Florida: Central Air Conditioning Co. v. Garren, 239 So.2d 497 (Fla. 1970). Claimant was on 24-hour call, and was furnished a truck by his employer for transportation. Claimant left work at about 3:15 A.M. and used the truck for personal business and pleasure for about five hours. He then began to return home on the same route he usually took from the job, and was injured in an accident. Claimant held to be on personal mission and not entitled to compensation.

Nebraska: Richtarik v. Bors, 142 Neb. 226, 5 N.W.2d 199, 142 A.L.R. 881 (1942).

See § 16.12 *supra,* however, for related types of case in which on-call policemen are considered covered during the going-and-coming trip because they are subject to being called into duty by incidents they encounter in the course of that journey, and for other situations in which on-call employees, like anyone else may have the benefit of the special-errand rule. See, e.g., Carroll v. Provenzano, 23 A.D.2d 134, 259 N.Y.S.2d 118 (1965). Claimant, a bartender, usually worked six days a week, receiving as part of his pay one meal eaten on the premises. He was asked by his employer to work an extra day, and during this period he was told to go home for lunch, and that the employer would call if he got busy. On his way back to work claimant slipped and fell on a public sidewalk. *Held:* The employer retained control over the claimant during the lunch perior for his own advantage. Compensation awarded.

[61] Peters' case, 345 Mass. 758, 186 N.E.2d 117 (1962). The assistant cook

Of the cases cited, one, [illegible] nurse for injuries sustained while she was bicycling for recreation during a stay with the family in Bermuda,[63] can be assimilated to the cases of both residents and traveling men in foreign or remote places, for whom and unusually broad range of activities have been brought within coverage.[64] The other, in which it was said that injury to a nurse on 24-hour duty while washing her car at her own home during a four-

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at Mount Holyoke College was required to live in a dormitory on the campus. Employees were encouraged to attend church without loss of pay. She fell on the public sidewalk of a public street which divided the campus, while en route from the dormitory to the campus church. *Held,* the accident did not arise out of or in the course of employment.

[62] *Florida:* Leeds v. City of Miami, 122 So.2d 474 (Fla. 1960). City detective on call 24 hours a day injured returning from personal errand. Compensation denied. **Treatise** cited.

Idaho: Beebe v. Horton, 77 Idaho 388, 293 P.2d 661 (1956). Fatal one-hour plane ride was personal trip outside employment of nursing home manager. Compensation denied. **Treatise** cited.

Louisiana: Bush v. Houston Fire & Cas. Ins. Co., 152 So.2d 377 (La. App. 1963). Employee on 24-hour stand-by duty fatally injured on personal, domestic errand while using his employer's truck. Compensation denied.

Oklahoma: Lane-Wells Co. v. Brewer, 433 P.2d 959 (Okla. 1967). Decedent's job required him to be on call 24 hours a day. However, his fatal injuries in a car accident occurred during a period of time when he was not on duty, and was on a personal mission. Award of death benefits reversed.

Jake's Casing Crews, Inc. v. Grant, 451 P.2d 700 (Okla. 1969). Claimant lived on the employer's premises and was on 24-hour call. He was severely injured in an accident while driving his employer's truck at 8:45 P.M. No evidence was introduced to show that claimant was following any work for the employer at the time of the accident. Award of compensation reversed for lack of evidence to support the claim.

Texas: Thomas v. Travelers Ins. Co., 423 S.W.2d 359 (Tex. Civ. App. 1968). Decedent lived in a trailer off the employer's premises, but was on 24-hour call. He was killed in a fire in the trailer while off duty. The court held that since decedent was only on call, and not on duty 24 hours a day, benefits could not be awarded without evidence as to how the fire started or what decedent was doing when killed. Death benefits denied.

[63] Clapham v. Davis, 232 App. Div. 458, 251 N.Y. Supp. 245 (1931).

[64] See § 24.21 Ns. 41 and 42 *supra,* and § 24.30 and § 25.23 *infra.*

hour rest period would be compensable, seems out of line with the majority of decisions.[65]

§ 24.30 Employees living on the premises but not on call

When a resident employee has fixed hours of work, and is injured outside those hours, he is apt to be successful in his claim only if he can show a somewhat stronger causal connection between the employment and the accident than suffices for the on-call employee.

Thus, it is held uniformly that a logger who is required to live in a bunkhouse,[66] or a janitor[67] or superintendent[68] who is required to live in apartment building, or a chef who is required to live in a hotel,[69] should be considered within the protection of Compensation Act when injured or killed by the burning of his place of residence. Here there is a close causal connection between the requirement of residence and the risk itself,[70] which was the burning of that residence. Similarly,

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[65] Robinson v. Levy, 20 N.J. Misc. 444, 28 A.2d 651 (1941).

See also Piazza v. Prince's Farm, 86 N.J. Super. 100, 206 A.2d 167 (1964). Claimant lived on employer's farm and was on 24-hour call. He was struck by a car while mailing a letter off his employer's premises. Compensation awarded. **Treatise** cited.

And see Wood v. N.Y. State Dept. of Environmental Conservation, § 24.21 N. 10 *supra.*

[66] Larson v. Industrial Acc. Comm'n, 193 Cal. 406, 224 P. 744 (1924).

[67] Finnegan v. Biehn, 276 N.Y. 50, 11 N.E.2d 348 (1937).

[68] Kozol v. Hasenohrl, 271 App. Div. 853, 66 N.Y.S.2d 64 (1946), *md'd,* 271 App. Div. 939 (1947).

[69] Giliotti v. Hoffman Catering Co., 246 N.Y. 279, 158 N.E. 621 (1927).

[70] As illustrating this point, see Schulz v. Handi-Man Co., 286 App. Div. 903, 142 N.Y.S.2d 180 (1955). Porter's heart attack from exertion in removing flood water from rent-free apartment on premises compensable.

Cf. Davis v. University of Del., 240 A.2d 583 (Del. 1967) *rev'g* 233 A.2d 159 (Del. Super. 1967). Clamant, a graduate student and salaried consultant for the university, was given a grant by the Friends Foundation to cover her room, board, tuition, and expenses. She lived in a dormitory as

when a logger is injured by the [illegible] bunk above into his open mouth,[71] by an assault in the bunkhouse at the hands of a crazed co-employee,[72] or by falling out of the upper bunk of a double-decker bed,[73] the relation between the required living conditions and the injury is still sufficient to support an award. An even stronger case is that of the strikebreaker who, while living in the employer's bunkhouse, was killed during the night by a bomb thrown by a striker.[74]

But when the distinct link between the conditions under which claimant is compelled to live and the nature of the injury is no longer apparent, most jurisdictions will deny com-

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part of her compensation from the university, and was injured during a fire drill there. The Superior Court granted a summary judgment dismissing the tort action, on the ground that the injury was within the Compensation Act, but the Supreme Court of Delaware reversed on the ground that there was a sufficient issue of fact as to the claimant's situation to make issuance of a summary judgment improvident.

[71] Holt Lumber Co. v. Industrial Comm'n, 168 Wis. 381, 170 N.W. 366 (1919).

[72] John H. Kaiser Lumber Co. v. Industrial Comm'n, 181 Wis. 513, 195 N.W. 329 (1923).

See also Argonaut Ins. Co. v. Workmen's Compensation Appeals Bd., 247 Cal. App. 669, 55 Cal. Rptr. 810 (1967). Claimant worked on a ranch, and lived on the premises. On a day off, he engaged in some horseplay with another employee, and after throwing some Kool-Aid in the other's face, claimant was pushed through a glass door. The fact that claimant was not required to be on the premises on that particular day was held not to exclude him from the operation of the "bunkhouse rule." Compensation awarded.

Cf. Johnstone v. State, 204 Misc. 239, 122 N.Y.S.2d 734 (1952). A cleaning woman who lived on the premises of the state hospital was injured when a patient threw herself on her while claimant was kneeling at Mass held on her day off on the premises of the hospital. The injuries were held not to have arisen out of her employment. This decision seems wrong in principle, both because the injury occurred on the premises and because the source of harm was strongly associated with the employment.

[73] Totton v. Long Lake Lumber Co., 61 Idaho 74, 97 P.2d 596 (1939).

[74] Malky v. Kiskiminetas Valley Coal Co., 278 Pa. 552, 123 A. 505, 31 A.L.R. 1082 (1924).

pensation, even though the source of injury is the exact kind of neutral or personal act which grounded recovery in the case of "on-call" employees. Thus, compensation was denied to a hotel maid who fell during the night while standing on a chair to close her window, since she had fixed hours of work;[75] to a resident nurse who slipped in her bath, on the same ground;[76] to hotel laundress doing her own laundry after hours;[77] to a chambermaid burned while curling her hair after hours, using an alcohol lamp in violation of rules;[78] and to a domestic servant who, on a free evening, fell on the stairs while on her way out to engage in free-lance baby-sitting.[79]

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[75] Brusven v. Ballord, 217 Minn. 502, 14 N.W.2d 861 (1944).

[76] Hall v. City of New York, 282 N.Y. 708, 26 N.E.2d 822 (1940).

[77] Daly v. Bates & Roberts, 224 N.Y. 126, 120 N.E. 118 (1918).

Brienen v. Wisconsin Pub. Serv. Co., 166 Wis. 24, 163 N.W. 182 (1917).

Callahan v. Martin K. Eby Constr. Co., 192 Kan. 814, 391 P.2d 315 (1964). Claimant damaged one eye by accidentally spraying some rust remover in it. At the time of the accident he had been told to "knock off" work, and was in the employer's house where he had slept the previous night. Compensation denied.

[78] Kraft v. West Hotel Co., 193 Iowa 1288, 188 N.W. 870, 31 A.L.R. 1245 (1922).

Reed v. Loon Lake Hotel, 283 App. Div. 763, 128 N.Y.S.2d 112 (1954). Compensation denied to a hotel waitress for a lacerated nose sustained as a result of dog scratches while she was sleeping. Contrary to rules, she kept her dog in the room and sometimes it slept in her bed.

[79] Edmonds v. Industrial Acc. Comm'n, 350 Ill. 197, 183 N.E. 12 (1932).

Rosen v. Industrial Acc. Comm'n, 239 Cal. App. 2d 748, 49 Cal. Reptr. 706 (1966). Claimant and his wife had an agreement with defendant landlord, under which they were to perform certain services in return for a $25 monthly reduction in rent. Claimant was injured on the premises while leaving on a personal mission. The court held that while the injury would have been compensable if it had occurred while work was being done for the landlord, it was not the legislative intent to extend the "bunkhouse" rule to situations such as this. Compensation denied.

Bauman v. Baltz, 20 A.D.2d 934, 248 N.Y.S.2d 941 (1964), *aff'd* 267 S.2d 214, 267 N.Y.S.2d 214, 214 N.E.2d 376 (1965). Claimant, a chambermaid and waitress, was injured while away from ther employer's premises, where

As mentioned at the beginning of the section, a broader coverage than this could be argued for on the analogy of lunch-time and rest-period injuries to factory workers. It seems clear that if a plant worker, during a rest period on the premises, stood on a chair to open or close a window, he would receive compensation for any injuries sustained as a result. If so, it might well follow that an employee forced to sleep on the premises should receive similar treatment, since both are on the premises, outside official working hours, indulging in the same activity: resting.

A few later cases indicate the beginning of a movement in this direction. Just a year after the *Hall* case,[80] denying compensation to a nurse who slipped in her bath on an off day, the New York Appellate Division awarded compensation to an attendant at a children's home who sometimes worked overtime, and who was injured when she got up at night to open the window.[81] And in 1949, without so much as mentioning the *Hall* case, the same court handed down the following terse opinion: "Deceased was employed as a porter in hospital. As part of his compensation he was furnished room, board and laundry. He fell in the bathroom in the building of his employer where he roomed. Death resulted. Award unanimously affirmed."[82] There is nothing here to indicate that the porter was on duty when injured; if there had been such evidence, it would probably have been mentioned, since it would have removed all doubt. The same trend was continued in *Walker v. Narolewski,*[83] in which a cook and dishwasher, who received

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she lived, on her day off. She was not required to leave, and was free to do what she desired. Compensation denied.

[80] N. 76 *supra* this subsection.

[81] Culver v. Sevilla Home for Children, 262 App. Div. 620, 30 N.Y.S.2d 917 (1941).

[82] Madigan v. United Hosp., 274 App. Div. 1077, 85 N.Y.S.2d 475 (1949).

[83] Walker v. Narolewski, 6 A.D.2d 735, 174 N.Y.S.2d 411 (1958), *aff'd*, 7 N.Y.2d 835, 164 N.E.2d 726, 196 N.Y.S.2d 709 (1959). **Treatise** cited.

Galvez v. Gold Coast Enterprises, Ltd., 23 A.D.2d 600, 256 N.Y.S.2d 436 (1965). Claimant received room and board as part of his wages. He was hurt

$25 per week and room and board, injured his hip when he slipped on the waxed floor, having got out of bed because he had a "charlie horse." An award was affirmed.

Simply walking on the employer's premises, outside fixed work hours, has been held in Connecticut to be within the course of employment, in *Carroll v. Westport Sanitarium.*[84] Here a resident maid, whose time was her own after 7:00 in the evening, had gone to visit her sister. On her return, while walking along a path toward the cottage where she was required to reside, she stepped on a clinker and was injured. Note that she had no active duties until the following morning, and was completely free to come and to as she chose at the time of the accident. The court brought the case within the category of injuries to resident employees on the premises, although clearly a fall at some point off the premises would have been noncompensable. It will be seen that the case resembles *Caney v. Straight,*[85] in which the summer resort cook fell while visiting a co-employee's cottage on the premises, the only difference being the presence of the "on-call" element in the latter case, although the injury occurred during a rest period. The *Carroll* case, then, represents a step in the direction of assimilating all resident employee cases to the broader rule of the "on-call" employee cases.

Arizona has produced a similar holding in the case of an employee working at the Grand Canyon and living in an apartment rented from the employer.[85.1] On her day off, the claimant had sustained injuries in a fall on the steps outside of her apartment. The Arizona Supreme Court held that, be-

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on his day off while going from his room to the kitchen to prepare a meal for himself. Compensation awarded.

Hubbard v. Marsh, 26 A.D.2d 718, 271 N.Y.S.2d 1006 (1966). Claimant, a waitress, received only a room on the employer's premises, plus tips, for her work. She was injured after working hours when she slipped on the stairs. Compensation awarded.

[84] 131 Conn. 334, 39 A.2d 892 (1944).

[85] § 24.21 N. 31 *supra.*

[85.1] Hunley v. Industrial Commission, 113 Ariz. 187, 549 P.2d 159 (1976).

cause the claimant did not own a car and was employed in a remote area, the south rim of the Grand Canyon, which offered no other reasonable housing alternative than to rent from the employer, the claimant was within the orbit of her employment when she used the premises, even though she was off duty. The evidence showed that the only other choice open to the employee was to purchase a mobile home—and this was beyond her financial resources.

Since an injury to a resident employee which takes place off the premises is usually not covered even when the employee is on call, *a fortiori* the same result would be expected when the employee is not on call. So compensation has been denied to a housekeeper taking a walk on a public highway after her day's duties were over,[86] on a construction worker at a remote site driving to town for lunch,[87] and to a college student working at a resort swimming in a pool not on the employer's premises.[88]

Just as in the case of traveling employees, the "camp show" cases involving entertainers in far-off places have led the way in broadening coverage of recreation and other incidental ac-

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[86] See Firemen's Fund Indem. Co. v. Industrial Acc. Comm'n, 39 Cal. 2d 529, 247 P.2d 707 (1952). Cook-housekeeper living on the premises regularly took short walks for her health during a free time in her working day. She missed her walk one day in order to care for her employer who was sick, and left for her walk at end of working day with her employer's permission. She fell and broke her leg on a public highway about 50 feet from her employer's premises. Compensation denied on the ground that she was engaged in a personal recreational activity and the injury did not occur on the premises. The dissent contended that she was really an on-call employee and that such an act for personal convenience need not be done on the premises for compensation to be awarded.

[87] Guido v. Terrarube Constr. Corp., 10 N.Y.2d 858, 178 N.E.2d 913, 222 N.Y.S.2d 690 (1961). The employees were furnished housing at the site, where they also cooked and ate their lunches. Three employees got tired of their own cooking and habitually drove a company jeep two miles to town for lunch. One employee was killed on a trip back to work.

[88] Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n, 39 Cal.2d 513, 247 P.2d 697 (1952), *rev'g* 239 P.2d 485. Although the pool was not on the employer's own premises, its use was taken for granted by the employees of this employer.

tivities;[89] so in the case of resident employees, there is developing a line of cases involving overseas construction workers, workers in camps, and the like, marked by unusual breadth in the compass of coverage. The trend was probably started by the decision of the United States Supreme Court in *O'Leary v. Brown-Pacific-Maxon, Inc.*[90] Here there had been provided, for the use of contractors' employees working on Guam, a recreational area near the shore, to which employees were taken without charge in company buses. On a Sunday, decedent was about to board the bus and leave the recreation area when he saw a stanger drowning in the surf, at a point where swimming was forbidden. His death while attempting a rescue was held to be compensable by the United States Supreme Court. The rescue point is dealt with later;[91] here it is interesting to observe that the Supreme Court was prepared without discussion to include the time spent at the recreation area on Sunday within the employment.

The federal courts have made the major contribution to this trend. Thus, in *Hastorf-Nettles, Inc. v. Pillsbury,*[92] an employee

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[89] See § 25.23 *infra*, and also reference to this factor at § 24.21 Ns. 41 and 42 *supra*.

[90] 340 U.S. 504, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

[91] See § 28.20 *infra*.

[92] 203 F.2d 641 (9th Cir. 1953).

Smith, Hinchman & Grylls Associates, Inc. v. O'Keefe, 222 F. Supp. 4 (M.D. Fla. 1963). *O'Leary* doctrine applied in the death of a civilian employee working in Korea under two-year contract. The employee drowned while hauling gravel across a lake to a friend's hunting lodge during the Memorial Day weekend holidays. Compensation awarded. This award was reversed by the Fifth Circuit, 327 F.2d 1003 (5th Cir. 1964), and reinstated by the Supreme Court, O'Keefe v. Smith, Hinchman & Grylls Associates, 380 U.S. 359, 85 S. Ct. 1012, 13 L.Ed. 895 (1965), largely on the strength of the *O'Leary* case, Harlan, Clark and White, J.J., dissenting, and Douglas, J., *dubitante*.

Pan Am. World Airways, Inc. v. O'Hearne, 335 F.2d 70 (4th Cir. 1964), *rev'g* 221 F. Supp. 515 (E.D. Va. 1963). Civilian employee, assigned a 45-day temporary duty on the Island of San Salvador, was killed in a jeep accident en route back to his quarters from a native beer tavern. The em-

of a subcontractor on Labor Day went by rail to the labor camp, where he stayed, for recreation. No recreation facilities were provided at the labor camp, which was located on a military base in Alaska. A driver of the contractor met the claimant, who was about to entrain to return to the camp, and invited him to return to camp with him in a truck owned by the contractor. The driver had checked the truck out for the recreational trip. On the return trip, about three miles from the camp, an accident occurred. It was held that the injury was compensable, because of the isolated location of the employment, its remoteness from available recreation, and the benefit to the employer and the employee "of recreation as an economic factor in industrial relations."

The federal cases reached their logical conclusion in *Self v.*

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ployer had furnished such refreshments at the "Reef Club"; thus, the trip to the native tavern was unnecessary. Compensation was awarded by the Deputy Commissioner, reversed by the District Court, and reinstated by the Circuit Court on the basis of the *O'Leary* case. Certiorari was denied, 85 S. Ct. 1080 (1965). To make the situation even more complex, Gondeck, the companion of the man killed in the *O'Hearne* case, was also killed, but his case came up in the Fifth Circuit, which denied compensation in Gondeck v. Pan Am. World Airways, 299 F.2d 74 (5th Cir. 1962), and cited the denial as a precedent in the *Smith, Hinchman & Grylls Associates case*, which, as we have just seen, was itself reversed by the Supreme Court. The Supreme Court, however, had earlier denied certiorari in the *Gondeck* case (370 U.S. 918, 82 S. Ct. 1556, 8 L. Ed.2d 499 (1962)). Nevertheless, the Supreme Court cited in support of the *Smith, Hinchman & Grylls Associates* case the Fourth Circuit award for Smith's death in the *O'Hearne* case, but did not mention the Fifth Circuit denial of compensation for the death of Smith's companion, Gondeck, or its refusal of certiorari in the *Gondeck* case.

As if this were not enough, another case, most unhelpfully named O'Keeffe v. Pan Am. World Airways, Inc., but no relation to any previously cited *O'Keefe* or *Pan American* cases, came up the Fifth Circuit route to the Supreme Court. In this case, the scene was Grand Turk Island and the death was the result of a motor scooter accident in the course of a social visit. The Deputy Commissioner made an award, the District Court reversed, the Fifth Circuit reinstated, and the Supreme Court denied certiorari. 338 F.2d 319 (5th Cir. 1964), 380 U.S. 951, 85 S. Ct. 1083 13 L. Ed. 895 (1965) (see statement in dissent). The statement of Wisdom, J., that "The Gondeck case stands alone . . . " is even more true now than when he made it.

Hanson.[93] The claimant was a stenographer who worked for a construction company on the island of Guam. As a basic principle, the court recognized that, on Guam, an employee is so isolated that the employer has an obligation to provide recreational facilities and opportunities. The stenographer, Miss Williams, also taught an adult night school class near the Air Base. The construction company vehicles were available to the employees, since no other form of transportation existed on the island. Shortly after Miss Williams was promoted to be Mr. Mussy's private secretary, he agreed to pick her up after night school and return her to the women's quarters. Instead of heading east to her quarters, he drove west to the end of scenic Crystal Breakwater and parked. There ensued a vehicle accident in which Miss Williams was permanently injured. The court held that the injury was in the scope of employment, because returning Miss Williams to the women's quarters, regardless of the extent of the recreational deviation, remained an employer provision of transportation and recreation.

The factor of the isolated character of the employee's work location also played a part in *Leonard v. Peoples Camp Corporation.*[94] The decedent worked as a laborer in a camp. He

[93] 305 F.2d 699 (9th Cir. 1962).

[94] 9 A.D.2d 420, 194 N.Y.S.2d 863 (1959) *aff'd,* 9 N.Y.2d 652, 173 N.E. 2d 46, 212 N.Y.S.2d 69 (1961).

Northern Corp. v. Saari, 409 P.2d 845 (Alaska 1966). Decedent was employed on a construction site at an air base in Alaska. He was not required to live there, but weather conditions made travel very impracticable. The employer provided living facilities, and arranged for employees to use the officer's club at the air base. Decedent was fatally injured while returning to his room from the club early Sunday morning. Death benefits awarded. Treatise cited.

Anderson v. Employers Liab. Assur. Corp., 498 P.2d 288 (Alaska 1972). Claimant was employed as an electrical lineman at a remote site in the Aleutian Islands. He was provided with living quarters on the employer's premises and free food, as well as a bar and recreational activities also provided by the employer. Claimant had regular hours of work, but was on 24-hour call. After entering into a wager with another employee as to who could climb a pole the fastest, claimant got his equipment and proceeded to climb

drowned in the lake while swimming on his day off. The court held that the existence of recreational facilities was an additional inducement of hire,[95] and that swimming was a reasonable activity of workmen required to live at a distance from home.

On similar considerations, compensation was awarded to a bartender at a ski resort, who was given a reduced-rate ski-lift pass, and was injured while skiing,[95.1] and to a graduate

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a pole. After a false start, he climbed to the top, and then fell, suffering injuries. The court held that when an on-call employee at a remote jobsite is injured while engaged in reasonable recreational activities, his injuries may be considered compensable, and that under the circumstances, claimant's activities could be considered reasonable, justifying an award of compensation. **Treatise** cited.

[95] Roher v. Cherry Grove Hotel & Restaurant, 20 A.D.2d 593, 245 N.Y.S.2d 173 (1963). Decedent worked for a hotel on Fire Island, several hundred miles away from his home. He was paid wages plus room and board. He drowned while helping to dock his employer's boat after returning from a personal shopping trip. Court held that the use of the boat could be considered an inducement to employment, and also that the employment status continues during the normal activities of an employee required to travel or sojourn at a distance from his home. Compensation awarded.

See also Dow v. Collins, 22 A.D.2d 250, 254 N.Y.S.2d 554 (1964). Decedent was working 150 miles from home and was living on his employer's premises. Decedent slept on the island where he worked rather than on the mainland where the other workers stayed. There was evidence that his equipment was on the island, that he worked extra hours, and that he liked to start work early. He was drowned after working hours using his employer's boat, which was permitted. *Held:* Decedent was drowned during a reasonable recreational activity incidental to his employment. Compensation awarded.

[95.1] Dorsch v. Industrial Comm'n, 523 P.2d 458 (Colo. 1974), *rev'g* 33 Colo. App. 168, 518 P.2d 954 (1974). Part of the claimant's remuneration for his employment as a bartender at a ski resort was a season lift pass at a reduced rate. During off-hours, the claimant was injured while skiing. The commission denied compensation. Its decision was affirmed by the appellate court, which held that the scope of the claimant's employment was not an issue of law but a finding of fact, with which they disagreed, but which they were powerless to change. But the Supreme Court of Colorado reversed. The issue was one of law. The relevant tests were (1) the extent to which the employer derived substantial benefit from the recreation policy, beyond in-

research assistant, engaged in cosmic ray studies in the Rocky Mountains, who, having no regular hours of work, went for a hike during a lull and was injured by the collapse of an outcropping of rock.[96]

There are *contra* cases, however, in which the special nature and hazards of the isolated environment have not appeared to affect the outcome. Thus, compensation has been denied to a waiter at a park motel who was severely mauled by a grizzly

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tangible morale improvement; (2) the extent to which the activity represented compensation; (3) the extent to which the employment created special dangers; (4) whether the recreation was an inducement to employment; and (5) whether use of the recreational facility was contemplated by the parties at the time of employment. The present case satisfied all these tests. Treatise cited.

[96] Rizzo v. Syracuse Univ., 2 A.D.2d 641, 151 N.Y.S.2d 724 (1956). Denial of compensation reversed.

See also: Doerr v. State, 129 N.J. Super. 150, 322 A.2d 491 (1974). The widow of a deceased member of the National Guard filed a claim for dependency benefits. The claim was filed under N.J.S.A. 38A: 13-1 which provides that death is compensable if it was incurred in the line of duty. On a Sunday, her husband and two other men died as a result of an explosion of one or more dud rounds of ammunition during a two-week stint in National Guard Service. The deceased and the other two men had entered a firing range to collect, as souvenirs, parachutes from artillery illumination rounds. The New Jersey Department of Defense denied benefits, holding that the deceased was not engaged in a work-connected activity when he was killed and that he was guilty of wilful neglect, since he was aware of the inherent dangers of being present on the firing range. The superior court reversed the decision and awarded benefits. It held that a liberal construction should be given to the phrase "in the line of duty" as provided in the pertinent statute, N.J.S.A. 3A: 13-1, considering the guardsman's dedication to public duty. While the claimant had no military duties on the day in question, he was in a duty status and pay status at the time of the accident. By seeking souvenirs with the other two men, the claimant did not deviate too far from the suggestion that the guardsmen engage in group activities or take trips to not too distant places. An employer who brings employees to an area far from his home has a responsibility which goes beyond that which the employer would have if the employees were stationed at the regular place of employment where they would have access to familiar types of recreation during off-duty hours. The decedent suffered death from a risk reasonably incidental to his employment and while he was doing what a man so employed may reasonably do.

woods who was attacked by a deer in the course of a walk,[97] to an employee attending an out-of-town company training school who was killed returning from a holiday picnic the employees had planned for themselves,[98] and to a kitchen helper in a boys' summer camp injured during his free time while engaged in gymnastics at a neighboring camp.[99]

§ 24.40 Residence on premises permitted but not required

When residence on the premises is merely permitted, injuries resulting from such residence are not compensable under the broad doctrines built up around employees required to reside on the premises. This distinction has been applied when the source of injury was the burning of the bunkhouse,[1]

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[97] Williams v. Glacier Park Co., 140 Mont. 440, 373 P.2d 517 (1962).

[98] Sally v. 500 Bushel Club, 332 Mich. 286, 50 N.W.2d 781 (1952). See criticism of this case at § 8.42 N. 82 *supra*.

[99] Grice v. National Cash Register Co., 250 S.C. 1, 156 S.E.2d 321 (1967). The court held that, although decedent had been working at a distant place, the employment in no way created the risk which resulted in his death. Death benefits denied.

[100] Diperri v. Boys Bhd. Republic of N.Y., 37 A.D.2d 317, 325 N.Y.S.2d 335 (1971). Claimant, after a three-day break, was instructed to return on Sunday evening to be prepared to work the following morning. He returned as directed, and since he had some free time went with some fellow employees to a nearby camp, where he was injured while engaging in gymnastics in the recreation room. The court held that the mere fact that claimant was engaged in a reasonable personal activity while compelled to be away from home did not of itself make the injury compensable, and since claimant was not obliged to seek recreation at the neighboring camp, the injury was not compensable.

[1] *Connecticut:* Guiliano v. Daniel O'Connell's Sons, 105 Conn. 695, 136 A. 677, 56 A.L.R. 504 (1927).

New York: McQuivey v. International Ry., 210 App. Div. 507, 206 N.Y. Supp. 851 (1924).

Texas: Wallace v. Texas Indem. Ins. Co., 94 S.W.2d 1201 (Tex. Civ. App. 1936).

tent,[2] or other residence furnished by the employer,[3] a fall from a porch,[4] a fall down stairs,[4.1] injury going toward or coming from the residence,[5] electrocution,[6] collapse of the hut in a high wind,[7] destruction of a trailer by a tornado,[8] and

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[2] Thornton v. Louisiana-Mississippi Pipeline Constr. Co., 214 Miss. 314, 58 So.2d 795 (1952). Compensation denied with very little discussion of compulsion problem or practice of the employer.

[3] Barrick v. Pocono Highland Camp, 208 Pa. Super. Ct. 72, 220 A.2d 662 (1966). Decedent was working at summer camp, where he had received room and board plus wages. However, the season was over, and the employees were living in the administration building while doing clean-up work. They were not required to live there, and were not on 24 hour call. Decedent was killed in a fire after his working hours. *Held:* Decedent was not in the course of his employment when killed. Compensation denied.

[4] Associated Oil Co., v. Industrial Acc. Comm'n, 191 Cal. 557, 217 P. 744 (1923).

[4.1] Munz v. L&J Plumbing and Heating Co., Inc., 49 A.D.2d 977, 374 N.Y.S.2d 365 (1975). The decedent's death was held noncompensable. Following his separation from his wife, he moved into the employer's building. He died from an after-hours fall down the stairs while going either to the lavatory or to the basement. The living arrangement was for the decedent's own benefit, and he was off duty at the time of the accident. The employer merely acquiesced in the decedent's living on the business premises.

[5] Guastelo v. Michigan Cent. R.R., 184 Mich. 382, 160 N.W. 484, L.R.A. 1917D 69 (1916).

Groff v. Uzzilia, 1 A.D.2d 273, 149 N.Y.S.2d 651 (1956), *aff'd*, 2 N.Y.2d 840, 140 N.E.2d 873, 159 N.Y.S.2d 980 (1957). Employee living on premises at employer's request not entitled to compensation for fall on staircase leading to sleeping quarters following Christmas celebration. **Treatise** quoted.

McGrath v. Chautaugua County Home, 26 A.D.2d 881, 274 N.Y.S.2d 219 (1966). Claimant lived on the premises but paid $25 a month for lodging. Originally claimant had been required to live on the premises, but this was no longer true, and no new employees were allowed to live there. Claimant was injured after working hours as she was leaving the Home. Compensation denied.

[6] Danville, U. & C. Ry. v. Industrial Comm'n, 307 Ill. 142, 138 N.E. 289 (1923).

[7] Philbin v. Hayes [1918] 87 L.J.K.B. (n.s.) [1918] W.C. & Ins. Rep. 194, 119, L.T.R. (n.s.) 133, 62 Sol. Jo. 519, 34 Times L.R. 403, [1918] W.N. 166, 11 B.W.C.C. 85 (C.A.).

[8] Williams v. Northern Dev. Co., 425 P.2d 594 (Wyo. 1967). At the re-

various other hazards not directly associated with the employment.[9] The theory is that when residence is mandatory, it is the constraints and obligations of the employment that subject the employee to the risk that injured him, while if the residence is optional,[10] the employee is free to do as he pleases

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quest of the employer, claimant moved her trailer onto its property, and was given her electricity and water. She was injured when a tornado demolished the trailer. The court found that claimant was not required to be on the premises when the tornado struck, and the injury was not compensable.

[9] Aquino v. Industrial Comm'n, 8 Ariz. App. 444, 447 P.2d 259 (1968). Claimant, by his own choice, chose to live in a camper at the job site, rather than commute to work from his home. A short time prior to quitting time he removed a piece of ice from the cooler which was used on the job, and was preparing to carry it to his camper when he injured his arm. Injury held to have occurred while claimant was on a personal mission, and therefore was not compensable.

Nevada Indus. Comm'n v. Holst, 83 Nev. 497, 434 P.2d 423 (1967). Claimant lived at the job site in a trailer furnished by the employer, although other employees chose to live in Las Vegas and commute to work. He was injured on his day off while at a golf driving range provided by the employer. Compensation was denied, the court holding that the employer received no tangible benefit from the recreational activity, and that since claimant did not have to live at the site, a "zone of special danger" had not been created by the conditions of the employment. **Treatise** cited.

Brooks v. New York State Dep't of Correction, 26 A.D.2d 850, 273 N.Y.S.2d 1001 (1966). Decedent was killed at 3:00 A.M. in a car accident on the grounds of defendant hospital. He lived on the premises, but was not required to do so, and had to pay a monthly rental, although it was lower than community standards. Employees living on the premises were subject to call in an emergency, but so were those living within the hearing range of the emergency whistle. Compensation denied.

Medina v. Shore Road Hospital., 4 A.D.2d 974, 167 N.Y.S.2d 637 (1957). Hospital waiter and assistant cook, permitted to live on premises, cut off two fingers while cutting a lemon for himself. Compensation denied.

Contra, Barbarise v. Overlook Hosp. Ass'n, 88 N.J. Super. 253, 211 A.2d 817 (1965). Claimant, a nurse, lived on the premises of her employer, but was not required to do so. She was injured while off duty in the residence. Compensation awarded. **Treatise** quoted.

[10] If the employee has the option at the beginning of his employment to reside or not to reside on the premises, and chooses the former, he is "required to live on the premises" from that time on. State Compensation Ins. Fund v. Industrial Acc. Comm'n, 194 Cal. 28, 227 P. 168 (1924).

and there is no continuity of employment obligation of any kind during the time the employee is voluntarily sleeping in a place provided for his convenience by the employer.

Logically, however, even in the absence of a requirement in the employment contract, residence should be deemed "required" whenever there is no reasonable alternative, in view of the distance of the work from residential facilities or the lack of availability of accommodations elsewhere. It is possible that several of the cases have failed to give sufficient weight to this kind of "requirement," and have stressed too heavily the absence of a formal requirement in the contract of employment. Thus, in the *Philbin* case,[11] most of the workers lived in the employer's huts because otherwise there would not have been accommodations for all. Yet the court denied compensation for injury due to the collapse of the hut on the argument that the employee had as much right to live elsewhere as did the employees who succeeded in obtaining accommodations in private quarters. And in the *Guastelo* case,[12] the court said, "While, owing to the nature of the work, which at times was remote from where men could secure accommodation, it was customary for defendant to furnish bunk cars on a siding near the work for the laborers to use if they desired, free of charge, it was not compulsory for them to do so, and some did not." This statement appears to place too much importance upon technical compulsion and not enough upon the compulsion of circumstances.

The better view is that expressed in *Allen v. D. D. Skousen Construction Company,*[13] and the cases there relied upon. The only alternative to living at the construction site, in this case, was to walk 12 miles to the nearest town and 12 miles back. The employer therefore allowed claimant to pitch his tent on the site. While claimant was preparing his own breakfast, a

[11] Philbin v. Hayes, N. 7 *supra* this subsection.

[12] Guastelo v. Michigan Cent. R.R., N. 5 *supra* this subsection.

[13] 55 N.M. 1, 225 P.2d 452 (1950).

can of gasoline near his tent became ignited [illegible] manner, and claimant was injured. Compensation was awarded. The principle point discussed was whether claimant must show that he was required to live on the premises. The court concluded that it was sufficient if, in view of the nature of the employment setting and the accommodations available, it was contemplated (as distinguished from required) that claimant should utilize the employer's bunkhouse or other on-premises sleeping facilities. For example, in *Wilson Cypress Company v. Miller,*[14] the employer furnished a house boat for such employees as wished to sleep there. An employee was sleeping in the houseboat and lost his life when it was destroyed by fire. The court said:

> "The law is well settled to the effect that when the contract of employment contemplates that the employee shall sleep on the employer's premises, as an incident to the employment, and is injured while not engaged on a purely personal mission, the injury is compensable. [Citing cases]
>
> "In this case Miller [the employee] was not required to sleep on the house boat. He could have held the job without sleeping there. The employer furnished the house boat, without cost to the employees, for the obvious purpose of furthering his business. It cannot be argued seriously that the employer did not contemplate the use of the boat to sleep his employees. The case comes within the well known bunk-house rule."[15]

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[14] 157 Fla. 459, 26 So.2d 441 (1946).

[15] 26 So.2d 441, at p. 442.

For cases in accord, see:

Arizona: Hunley v. Industrial Commission, 113 Ariz. 187, 549 P.2d 159 (1976). On her day off, the claimant sustained injuries in a fall on the steps outside of her apartment. The court held that, because the claimant did not own a car and was employed in a remote area, the south rim of the Grand Canyon, which offered no other reasonable housing alternative than to rent from the employer, the claimant was within the orbit of her employment when she used the premises, even though she was off duty. The evidence

showed that the only alternative open to the employee was to purchase a mobile home—and this was beyond her financial resources. **Treatise** quoted.

California: Aubin v. Kaiser Steel Corp., 185 Cal. App.2d 658, 8 Cal. Rptr. 497, 25 Cal. Comp. 217 (1960). An employee worked in desert area and lived in a domitory. Fatal accident at beginning of recreational trip while still on employer's property. Widow's sole remedy was workmen's compensation.

Truck Ins. Exch. v. Industrial Acc. Comm'n, 27 Cal.2d 813, 167 P.2d 705, 707 (1946).

Nebraska: See Bourn v. James, 91 Neb. 635, 216 N.W.2d 739 (1974). § 24.21 N. 29 *supra.*

New York: Lane v. Fort Neck Dredging Co., 28 A.D.2d 949, *aff'd,* 22 N.Y.2d 965, 295 N.Y.S.2d 333, 242 N.E.2d 485 (1968) 281 N.Y.S.2d 622 (1967). Decedent's contract provided for living quarters and meals on the dredge where he worked for $8.75 per week, with an allowance of $10 if such facilities were not available. Since they were not, decedent lived on shore, and was killed on his way to the dredge. *Held:* The substitution of living quarters created a new work-connected hazard to which decedent was exposed, and the death was compensable.

Broman v. A. Brassard, Inc., 35 A.D.2d 142, 314, N.Y.S.2d 850 (1970). Claimant worked at a job site a considerable distance from his home. He wished to reside near the site, and he and several other employees were given permission to reside on the premises while the work was being done. Claimant was injured while off work, but on the premises. Award of benefits affirmed, the court holding that although the reason for residing on the premises might have been purely personal, the employer benefitted, in that it permitted claimant to work overtime to complete the project.

South Carolina: Jolly v. South Carolina Indus. School for Boys, 219 S.C. 155, 64 S.E.2d 252 (1951). Injury while painting apartment furnished rent free. Compensation awarded

Wisconsin: Muson v. Industrial Comm'n 248 Wis. 192, 21 N.W.2d 265 (1946).