

ed workers' compensation laws before the close of 1911. By the end of 1920, 42 states plus Alaska and Hawaii (even though statehood didn't come for either until 1959) enacted workers' compensation statutes. Mississippi was the last state to implement a workers' compensation statute, waiting until 1948.

Voluntary vs. Compulsory

Early programs (1911-1916) were voluntary participation laws. Employers were not compelled by the various statutes to purchase workers' compensation. Compulsory participation laws had been found unconstitutional. The Fourteenth Amendment required due process before a person or entity could be compelled to part with property.

In 1917, the Supreme Court upheld the constitutionality of compulsory insurance requirements, opening up the doors for every state to require the purchase of workers' compensation coverage. Then, as now, each state instituted different threshold requirements.

Conclusion

Workers' compensation laws have evolved and expanded since the beginning, but these are the roots of the modern American workers' compensation system. The following chapters detail many of the issues surrounding workers' compensation rather than focusing merely on the coverage provided in the policy

Chapter 2

On-the-Job Injury: The 'Course and Scope' Rule

Workers' compensation statutes differ among jurisdictions regarding the threshold for compulsory participation, benefit schedules, contractor/sub-contractor relationships and most other statutory specifics. But there is one concept on which every state agrees and to which every state subscribes. This point of agreement is that to be compensable, *injury or illness must arise out of and in the course and scope of employment.*

The Three Tests

"**Arising out of...**" indicates a causal connection between the furtherance of the employer's business and the injury. If the employer benefits in some way from the activity, then the injury or illness suffered in the pursuit of that activity is considered to "arise out of" the employment. One of three "causal connection" doctrines is applied by the various states:

- **Increased risk doctrine.** This is the most common among the jurisdictions. If the employment increases the chance of injury, then there is a causal connection between the work and the injury.
- **Actual risk doctrine.** If the employment itself presents a risk of injury, then there is a causal connection between the employment and the injury.
- **Positional risk doctrine.** This is the minority view. Jurisdictions applying this test only require the injury occur at work to prove a causal connection between the work and the injury. The mere fact the person is at work is enough.

“**In the course...**” is a function of the timing and location of the injury or illness. The implication is that the injury must occur during operations for the employer, or “during employment,” and at the employer’s location or a location mandated or reasonably expected by the employer. New working conditions and relationships do not necessarily limit this to an on-site, 8-to-5 exposure.

Generally, if there is provable causal connection between the work and the injury (the “arising out of” test is satisfied), the “in the course of” test is also satisfied. However, the “in the course of” test is sometimes required to prove the injury arose out of the employment.

“**Scope of employment...**” test serves to more specifically define the first two tests by: 1) analyzing the motivations of the employee, 2) analyzing the employer’s direction and control over the actions of the employee and 3) analyzing the employer’s ability to foresee the activities of the employee. Employee actions which ultimately lead to an accident or injury must be motivated, in whole or in part, by the “desire” to further the interests of the employer. Motivation or desire can be out of fear that failure to perform will result in the loss of a job, or from a more altruistic desire to do well for the employer. The basis for the motivation or desire is irrelevant; it is the fact that the motivation exists that leads to compensability. Further, the actions must, to some extent, be at the presumed direction of the employer or potentially foreseen by the employer.

Injury may, in fact, arise out of and be in the course of employment but still be outside the scope of employment, negating compensability under workers’ compensation law. For example, while entertaining clients, a company executive gets into an argument with a group sitting at another table because they are being too loud. A fight breaks out and the executive is severely injured. Such injury is not likely compensable under workers’ compensation. Yes, the injury arose out of and in the course of employment (entertaining clients to further the employer’s business), but was outside the scope of employment. The employer’s goals were not furthered by the fight (nor was that the motivation), and the employer likely never directed nor

foresaw the need for the employee to be involved in a fistfight as a result of his employment.

Another example of an injury outside the scope of employment can be found in Exhibit 2.1 at the end of this chapter. This recounts the story of a McDonald’s employee shot after ejecting a patron from the restaurant.

Not Always Easy to Establish Course and Scope

Establishing an injury as work related is much simpler when employees work from a fixed place of employment on a fixed schedule and are injured while in the midst of their assigned duties. A production employee injured by a press (or whatever type of machine) during her shift will meet all three tests with only minor question. Likewise, an office employee injured when a computer falls on him raises little doubt that the injury arose out of and in the course and scope of employment. There are few objections that could be raised in these situations upon which a denial of coverage could be based (beyond drug use).

Employees away from the employer’s premises, involved in employer-sponsored recreational activities, who like to horseplay or pull practical jokes on their coworkers, who have personal issues that leak over into work, or who have pre-existing conditions or a predisposition to injury present particular problems when judging the compensability of an injury. Injury to any employee falling into one of these categories requires careful evaluation before coverage is assured.

Have Briefcase/Tool Belt, Will Travel

Many employees travel to conduct business on behalf of their employer; injury suffered by an employee away from the premises for business purposes is generally considered to arise out of and in the course and scope of employment and is compensable. The proximate cause of the employee’s injury is the furtherance of the employer’s interest; that’s the reason for such a broad extension of coverage for employees injured while travelling.

For example, a specialty electrical contractor is hired to install wiring at a plant several hundred miles away from the contractor's home office. The eight-man crew will be on site four days. Several hotel rooms are rented for the employees to stay in when the day's work is done. Every evening, the crew goes out to dinner; while walking to a restaurant next to the hotel, one employee steps in a hole, falls and breaks his arm. This is a compensable injury as he was still in the course and scope of his employment.

Under the application of “proximate cause,” the employee would not have been walking through the parking lot to get dinner *but for* the fact that his employer sent him there to work. He is furthering the employer's business. Additionally, eating dinner is within the course and scope of the employment as the employer likely provided a stipend to pay for the meals, “directed” them to eat and could have reasonably foreseen them needing and wanting to eat.

After dinner, a member of the crew decides to drive over to visit some family and friends in the area. On his way back to the hotel he is badly injured in an at-fault automobile accident. Does the workers' compensation carrier have grounds to deny the compensability of the injury? Yes, payment for this injury will likely be denied. Visiting family and friends does not arise out of the employment and is not in the course and scope of the employment. The employer did not direct the employee to depart nor did he sanction the deviation from the approved path (job, hotel, dinner). This is considered *abandonment of employment*. The employee has undertaken a personal task/errand that neither benefits the employer, nor is approved by the employer.

Abandonment of employment is the point at which an employee deviates from the permitted or expected course and scope of the off-premises work and engages in activities not intended for the advancement of the employer's business nor directed by the employer. This includes any activity in direct contradiction to the rules, requests, or expectations of the employer.

Working from Home

Employees working from home-based offices are afforded the same workers' compensation protection as those camped in an office

building. Determining the compensability for an injury suffered at home requires meeting the same qualifications as one suffered on site; injury must arise out of and in the course and scope of employment.

Tennessee's Supreme Court ruled on such a case in November 2007. InsuranceJournal.com reported the Court's findings in *Wait v. Travelers Indemnity Co. of Illinois* on November 26, 2007.

Kristina Wait took a lunch break from her work for the American Cancer Society; a neighbor knocked on her door and Wait let him inside. After a brief conversation the neighbor left but returned a few minutes later, claiming he forgot his keys, and brutally assaulted Wait upon re-entering the home.

Wait's claim for workers' compensation benefits was ultimately denied by the Tennessee Supreme Court. The court reasoned that while the kitchen was equivalent to an office-based lunch or break room and taking lunch was within normal course and scope of employment (expected and foreseen by the employer), the attack was outside the purview of workers' compensation because it had nothing to do with Wait's role for the ACS. It was simply a personally motivated attack unrelated to the employment.

Other Home-Based Problems

Another example of non-compensable injury might include a home-based employee taking a break to go attend to his children. He has abandoned his employment and is no longer pursuing the employer's interest, but his own. If he is injured while playing with the children, such injuries did not arise out of or in the course and scope of employment. If, however, a file cabinet topples over on him while searching for information, the injury is compensable.

Unique workers' compensation exposures are created for employers allowing employees to work from home; exposures that may not be present with office-based workers. These include greater exposure to road hazards, a change in the “coming and going” rule (detailed in Chapter 3) and difficulty meeting the requirement to provide a safe and healthy work environment.

For security and safety purposes or to provide a more professional appearance, employees with a home office may be directed or encouraged to set up a post office box or other mail box arrangements rather than utilizing their home address. Having such a box requires the employee to check it periodically, unlike office-based employees whose mail is delivered to their desk or a central mail room. Traveling to and from the box is considered arising out of and in the course and scope of employment. Injury suffered in an auto accident may be a compensable injury.

Employers may allow certain employees to telecommute three or four days a week, requiring them to report to the office only once or twice a week for various reasons. Generally, workers’ compensation benefits do not apply to employees travelling to and from work (known as the coming and going rule). However, since the employee is leaving one *per se* office location to travel to another, the entire trip may be considered in the course and scope of employment making any injury compensable.

Additional consideration must be given to telecommuting employees’ health and safety. Employers are charged with providing a safe and healthy work environment; the requirement extends to employees working in their homes. Employers assure that employee workspace in the office is ergonomically designed, but rarely is such precaution taken with home-based employees. Repetitive motion injuries (such as carpal tunnel syndrome), back injuries from incorrect desk set-up and posture and eye strain are just as likely among telecommuting employees as among office-based staff. Employers are not on-site to risk manage and loss control the home office design, but workers’ compensation claims from the same sorts of office-based injuries can still present themselves.

Exhibit 2.1

McDonald’s Denial of Work Comp Benefits to Worker Shot is Appropriate

Nigel Haskett, 21 at the time he was shot, is or was an employee of a McDonald’s franchise in Little Rock, Arkansas. On August 26,

2008, Haskett physically restrained a man and expelled him from the restaurant to end his battery of a female patron. Perry Kennon, the alleged attacker, went to his car, retrieved a gun and shot Haskett several times as he stood in front of the door to prevent Kennon’s re-entry.

Police and the public have hailed Haskett’s actions as heroic. But the franchisee’s workers’ compensation carrier is not swayed by such sentiment – they have denied Haskett’s claim for workers’ compensation benefits outright, claiming that his injuries did not “arise out of or within the course and scope of his employment” (as reported on rawstory.com and various other news sources).

The “Course and Scope” Rule

Few provisions surrounding workers’ compensation coverage are agreed on by multiple states, much less every state. But every state does abide by the three-test “course and scope” rule. To be compensable, the injury must “*arise out of and be in the course and scope of employment.*” Each of these terms is more specifically defined as follows:

- “**Arising out of...**” indicates a causal connection between the furtherance of the employer’s business and the injury. If the employer benefits in some way from the activity, then the injury or illness suffered in the pursuit of that activity is considered to “arise out of” the employment.
- “**In the course of...**” is a function of the timing and location of the injury or illness. The implication is that the injury must occur during operations for the employer, or “during employment,” and at the employer’s location or a location mandated or reasonably expected by the employer.
- “**Scope of employment...**” serves to more specifically define the first two tests by: 1) analyzing the motivations of the employee, 2) analyzing the employer’s direction and control over the actions of the employee, and 3) analyzing the employer’s ability to foresee the activities of the employee. Employee actions which ultimately lead to an accident or injury

must be motivated, in whole or in part, by the "desire" to further the interests of the employer. Motivation or desire can be out of fear that failure to perform will result in the loss of a job, or from a more altruistic desire to do well for the employer. The basis for the motivation or desire is irrelevant; it is the fact that the motivation exists that leads to compensability. Further, the actions must, to some extent, be at the presumed direction of the employer or potentially foreseen by the employer.

Comparing Haskett's Actions with the "Course and Scope" Tests

Do Haskett's actions meet the requirements of each test? Comparing his actions with each requirement will clarify whether the workers' compensation carrier is correct in its denial or not.

Arising out of...: Does protecting patron safety benefit the business and further the business' objectives? Haskett's attorney stated his belief in an interview with a Little Rock television station that these actions accomplished both. If it can be proven that the employer and the business did or would somehow benefit from Haskett's actions, his injury may be judged to have "arisen out of" his employment.

Presumably, McDonald's business objective is to prepare and serve food while maintaining a safe and clean environment for its employees and customers. The question of whether wrestling someone out of the restaurant to prevent them from attacking another person qualifies as being a part of that objective. If customers feel safe, they are likely to eat at the restaurant.

Although a definitive "yes" to the question of "arising out of..." is tough to give, Haskett's actions border on furthering the business' objectives. It appears that his being shot arose out of his employment and satisfies the first test.

In the Course of...: This test is much easier to assign a definitive "yes." Haskett was on the premises of his employer, he was "on the clock" and presumably working at the time (not on break). No question that the injury occurred during the course of his employment.

Scope of Employment: Compensability of Haskett's injury is on shaky ground when compared against the "scope of employment" test. This test has three qualifiers: 1) the motivation of the employee must be to further the employer's business, 2) the employer must have some direction and control over the employee's actions and 3) the situation and actions must be foreseeable by the employer.

- *Employee's motivation:* It is not likely that Haskett was motivated by the employer's business objectives. While his motivation was admirable, the protection of a seemingly defenseless individual, it does not meet the first test.
- *Direction and control of the employer:* While the employer, in a letter to the press, supports and applauds Haskett's dedicated actions, neither he nor any manager directed Haskett to act as he did. The second qualifier is also not met.
- *Employer's ability to foresee the situation and actions:* The question as to whether the situation was foreseen by the employer is somewhat gray based on the differing accounts provided by the two parties. According to McDonald's, part of employee training and orientation is a directive to not "try to be a hero." The employee handbook specifically states that the police are to be called and the employee is to not engage a robber or other such individuals. Haskett states in news reports that he never received this training.

If such warning and direction is in the employee handbook, which probably contains a signed statement that it was read in its entirety by Haskett, then the employer did foresee the possibility for a dangerous situation and gave strict instruction for employees to not engage. It was the anticipation and instruction of the employer that the employee stay out of harm's way. The third qualifier also falls against Haskett and in favor of the workers' compensation carrier.

Haskett's injury was NOT in the "scope of employment." His actions met none of the three "scope" requirements and he fails the third test.

Not Compensable

Sadly, two-out-of-three is not good enough; all three “course and scope” tests must be passed. The workers’ compensation carrier may be correct in their denial of workers’ compensation benefits for this injury.

Some arguments for compensability of this injury say that Haskett would not have been injured “but for” his being at work; this argument falls short because workers’ compensation is not solely based on proximate cause. Just being “at work” is not enough to garner protection.

Based on the letter of the law, this is not a compensable claim when compared to the three-test “course and scope” requirement. Perhaps Haskett and his attorney can show “implied consent” or “ratification” of his actions since the employer did not try to stop him from throwing Kennon out of the store; or pull him inside when he stood at the door to prevent the attacker’s reentry. The employer’s inaction may be considered “at the employer’s direction.”

Regardless, this will likely go to trial before it is finally settled. It is impossible to know what any jury will do, so stay tuned.

Chapter 3

Gray Areas in ‘Course and Scope’ Injuries

The threshold requirements that to be compensable an injury must: 1) arise out of, 2) be in the course of, and 3) be in the scope of employment leaves many gray areas. Major gray areas in the course and scope rules include:

- The Coming and Going Rule;
- “Forced Fun”; and
- Horseplay and Practical Jokes

‘Coming and Going’ Rule

Injury suffered traveling to work or home from work or even while going to and returning from lunch is generally not compensable. Known as the **coming and going rule**, the logic behind the rule is that the employee is not furthering the employer’s interest or serving the business’ needs. The employee is serving his own purposes and furthering his own cause during this course of travel; namely going to an employment situation where a paycheck is delivered for services rendered, going to lunch or going home.

The employer is not the proximate cause of the individual being on the road; the employee has not arrived at a place where services are rendered to the employer and injury suffered is not compensable.

Exceptions to the coming and going rule do exist. Anytime travel is an integral part of employment or such travel furthers the employer’s business, the coming and going rule is superseded, making injury compensable. Travel considered integral to the employment includes travel between jobsites and travel to meet clients.

Other “special hazard” exceptions to the coming and going rule include: