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travel is an integral part of employment or such travel furthers the employer's business, the coming and going rule is superseded, making injury compensable.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:

- ***Employer-furnished transportation***. If the employer undertakes to provide group transportation to and from office or job site, injury suffered during the trip is compensable. An off-beat example, especially in areas where there is little snow, is the small business owner who picks up his/her employees on snowy days to assure the office is staffed and, altruistically, to keep the employees from having to drive. Employee injury during this travel is potentially compensable under workers' compensation;
- ***The employee performs a beneficial errand for the employer***. Going to the bank, the post office or on any other errand to further the business of the employer qualifies as a beneficial errand. If the errand requires the employee to deviate from her normal route, any injury suffered from the time the employee leaves the premises until she returns to her normal route is likely compensable. Errands taking the employee outside his normal ways and means are considered "for the benefit" of the employer making injury compensable;
- ***Injury suffered by an "on call" employee***. Doctors or those in other employments who must be ready to respond when the "call" comes are considered to be within the course and scope of employment immediately upon responding to the call. The drive is considered to be part of furthering the employer's business making injury compensable;
- ***If the employer reimburses or pays the employees*** transportation costs, the trip is considered business-related and for the benefit of the employer. Injury suffered is compensable unless abandonment of employment is proven;
- ***Injury suffered once the employee enters the parking lot***. Courts ascribe a reasonable time for employees to reach their assigned work station. During this time, the employee is considered to be in the course and scope of employment. "The clock" begins to tick (so to speak) when the employee arrives in the parking lot. The reverse is true; the employee is considered to be within course and scope until he leaves the parking lot. Injury suffered prior to and after leaving the parking lot is not covered (unless one of the other exceptions apply). The breadth of this special exception is applied differently by each state.

Chapter 3 – Gray Areas in 'Course and Scope' Injuries

Play Ball! Or 'Forced Fun'

Extending the "course and scope of employment" doctrine to recreational activities combines questions of fact decided by juries and questions of law decided by the court. Employees injured while participating in recreational activities while on the employer's premises or at the employer's "direction" may qualify for workers' compensation coverage. Four tests are applied to the facts surrounding the injury to decide compensability:

1. ***Did the accident occur on the employer's premises?*** An affirmative response does not guarantee compensability. An employee injured while engaged in a pick-up basketball game on the employer's premises will not be eligible for workers' compensation becasuet he employer is not directly benefitiing from the activity nor is the employer directing the activity. Making recreational facilities available does not make the employer liable. But neither is it required that the injury occur on the employer's premises to be compensable.
2. ***Was the event or team organized by the employer?*** Company-organized softball teams competing in "industrial leagues" may qualify under this provision. However, several employees deciding to form a team is wholly different from a team organized by the employer, encouraging "good" ballplayers to participate.
3. ***Did the employer pay for the activity?*** It is unclear if this refers to the total cost or a subsidy on behalf of the team. For example, the league charges every player $50 but the company pays $40 on behalf of each player/employee. While the activity is not fully paid for by the employer, it could be viewed as an employer-paid or sponsored (with participation encouraged).

4. ***Did the employer benefit?*** Advertising in the community (team shirts), improved employee morale or better team work. An employer can "benefit" from these activities in more ways than tangible outputs.

Employee picnics, team building outings and Christmas dinners are a few examples of other types of recreational and social activities that may lead to compensable injuries. State statutes should be reviewed regarding the issue of recreational activities. Some states have adopted relative pro-employer statutes to limit compensability to activities in which employees are "expected" to participate.

Horseplay and Practical Jokes

Court and legislative attitudes have shifted regarding the compensability of injury suffered as a result of horseplay. Historically courts held that horseplay was such a deviation from the course and scope of employment as to qualify as an abandonment of duty. Injury suffered outside the "course and scope" is not eligible for workers' compensation protection; injured employees, even the non-participating (innocent) party, were routinely denied coverage.

"We are clearly convinced here that our old rule should be abandoned. Although appropriate for the time in which it arose, we are persuaded by the overwhelming weight of contrary authority in our sister states and current legal commentary." With this statement, the Kansas Supreme Court overturned decades of prior case law regarding compensability of injury resulting from horseplay. The court's opinion in *Coleman v. Armour Swift-Eckrich* mirrors the prevailing attitude surrounding injury arising out of horseplay; especially injury to the non-participating/innocent employee that such injury could still fall within the course and scope of employment.

Prevailing opinion now centers on and applies a treatise known as "Larson's Workers' Compensation Law" (Larson). Larson applies a four-part test of the facts surrounding the horseplay-associated injury to establish compensability. The four tests of fact are:

- The extent and seriousness of the deviation. Was the horseplay "reasonable" or did the parties go so far out of the way as to constitute unreasonable deviation? In one case, three men wrapped another employee from his ankles to his shoulders in duct tape. The injured employee was allowed to forego the sole remedy offered by workers' compensation and sue the participants in tort as the activities were considered too far outside "normal."
- The completeness of the deviation. Was the horseplay comingled with the regular performance of duties or did it involve (and require) an abandonment of duty?
- The extent to which the practice of horseplay has become an accepted part of the employment. If horseplay, practical jokes and hazing are common and not discouraged or forbidden by the employer, then it is reasonably judged to be part of normal employment and within course and scope.
- The extent to which the nature of employment may be expected to include some horseplay. Some industries lend themselves to horseplay; those working in those industries should expect to be exposed to it. As such, it is a normal part of employment and injury may be compensable.

According to Larson itself, it is not required that all four tests be satisfied for an injury to be compensable. "It is now clearly established that the nonparticipating victim of horseplay may recover compensation."