

LARSON'S WORKERS' COMPENSATION, DESK EDITION

CHAPTER 25 TRAVELING EMPLOYEES

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SCOPE

An employee whose work entails travel away from the employer's premises is generally considered to be within the course of his or her employment continuously during the trip, except when there is a distinct departure on a personal errand. Thus, injuries flowing from sleeping in hotels or eating in restaurants away from home are usually compensable.

§ 25.01 Summary

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.¹ Thus, injuries

arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

FOOTNOTES:

Footnote 1. *E.g.* *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 316 S.E.2d 86 (1984). An interstate truck driver was shot during an attempted robbery while he was sitting in the cab of his truck at one of his delivery locations. He was off-duty until resuming his trip the following morning. The court upheld the finding that he was in the course of employment in the absence of proof that his activity at the time was a distinct departure on a personal errand.

§ 25.02 Hotel Fires and Other Hotel Injuries

A traveling employee who dies as a result of a fire or asphyxiation in a hotel or motel during the business trip is within the coverage of the compensation acts.¹

The best reasoning in support of this result is that given in *Souza's* case,² which shows that there is no difference in principle between the employee who is housed upon the employer's own premises and the employee who is housed in a hotel room paid for by the employer. If an employer took a lease of a building adjacent to the premises and required workers to live there, they would have the benefit of the rules applicable to workers who live on the premises; it is no different when the employer takes a "lease" of a single hotel room and lodges the traveling employee there. The latter employee may indeed have a choice between several hotels; that is not the point. The point is that there is no choice but to live in *some* hotel away from home.³ This "choice" is again no different from giving an on-premises employee the choice of different rooms or buildings on the premises, so long as the employee is required to live somewhere on the premises.

For many years, it was assumed that the rule in New York was *contra*, on the strength of certain dicta in *Kass v. Hirschberg, Schutz & Company*.⁴ Compensation was denied in this case for the death of a traveling man asphyxiated in his hotel. The principal ground of the decision was that the decedent was not engaged in a hazardous occupation. But the court went on to add some expressions to the effect that, after all, a traveling employee's hotel is merely a home away from home, so that whatever happens to the employee there, or while going to or coming from there, is the same as whatever happens to the employee at or around the home.

This idea colored New York decisions for a long time, but when two clear-cut hotel-fire cases were presented in 1950,⁵ the New York

Appellate Division wholeheartedly adopted the general hotel-fire rule, without so much as mentioning the *Kass* dicta. The Court of Appeals, by denying leave to appeal, indicated that it had no inclination to disturb this move by the Appellate Division. Finally, in 1967, forty-seven years after the *Kass* dicta, the Court of Appeals removed all doubt by handing down a favorable award in a typical hotel-fire case.⁶

While the rule discussed in this subsection has sometimes been loosely referred to as the "hotel-fire doctrine," it of course applies to any other mishap associated with the necessity of living in hotels, motels, or temporarily rented apartments, and indeed has been invoked as to such widely-assorted tragedies as getting one's head caught in the slats of a motel bed,⁷ falling out of a hotel window,⁸ inexplicably falling and striking one's head on the floor while checking out,⁹ being raped in a hotel room,¹⁰ exposure to air-conditioning,¹¹ and being murdered in a motel.¹²

Where, however, the "hotel fire" was caused by the improper lighting of a cigarette by an intoxicated host at a company cocktail party held in a hotel hospitality suite, the employee was unsuccessful in recovering benefits for second and third degree burns. The risk of lighting a cigarette was in no way inherent in or increased by the claimant's employment.^{12.1}

FOOTNOTES:

⁶Footnote 1. *Wiseman v. Industrial Acc. Comm'n*, 46 Cal. 2d 570, 297 P.2d 649 (1956). Compensation was awarded even though the fire was caused by the careless smoking of an employee or that of a woman, not his wife but registered as such.

⁷Footnote 2. *Souza's Case*, 316 Mass. 332, 55 N.E.2d 611 (1944).

⁸Footnote 3. For a case in which the employees did have a choice of whether to return home, see *Knox v. Batson*, 217 Tenn. 620, 399 S.W.2d 765 (1966).

Cf. another case involving a construction worker: *Rodriguez v. Great Am. Indem. Co.*, 244 F.2d 484 (5th Cir. 1957). The death of a carpenter from hotel fire was not compensable, even though the carpenter was at the hotel because the job site was about 160 miles from his home, and the employer had paid for the lodgings.

⁹Footnote 4. *Kass v. Hirschberg, Schutz & Company*, 191 App. Div. 300, 181 N.Y. Supp. 35 (1920).

¹⁰Footnote 5. *In re Buck's Estate*, 277 App. Div. 126, 98 N.Y.S.2d 734 (1950), and *Blake v. Grand Union Co.*, 277 App. Div. 914, 98 N.Y.S.2d 738 (1950).

¹¹Footnote 6. *McKay v. Republic Vanguard Ins. Co.*, 20 N.Y.2d 884, 285 N.Y.S.2d 857, 232 N.E.2d 854 (1967).

Footnote 7. *Peterson v. Industrial Comm'n*, 16 Ariz. App. 41, 490 P.2d 870 (1971).

Footnote 8. *Southern Motor Lines Co. v. Alvis*, 200 Va. 168, 104 S.E.2d 735 (1958).

But see Goranson v. Dept. of Indus., Labor & Human Relations, 94 Wis. 2d 537, 289 N.W.2d 270 (1980).

Footnote 9. *Fallon v. National Gypsum Co.*, 53 A.D.2d 745, 384 N.Y.S.2d 232 (1976), *appeal denied*, 40 N.Y.2d 803, 387 N.Y.S.2d 1030, 356 N.E.2d 482 (1976).

See also American Airlines v. LeFevers, 674 So. 2d 940 (Fla. Dist. Ct. App. 1996), *reh'g denied*, (July 01, 1996).

Cf. Knox v. Administrator, Bureau of Workers' Comp., 125 Ohio App. 3d 313, 708 N.E.2d 298 (1999). The jury found that the plaintiff was acting within the course of his employment when he slipped and fell while getting out of a hotel shower during a business trip. On appeal, the court affirmed the decision below noting that the plaintiff's evidence included that weather conditions were poor at the end of the conference, more bad weather was predicted--and that the plaintiff, who had multiple sclerosis, had driven to the conference with his wife and two young children.

Footnote 10. *Jean Barnes Collections v. Elston*, 413 So. 2d 797 (Fla. Dist. Ct. App. 1982). The claimant had been traveling with her employer for training purposes and staying at a hotel when she was attacked. The court held that the injuries resulting from the rape were compensable under the "traveling employee's rule." **Treatise** quoted.

Footnote 11. *Kozlowski v. Howard Sober, Inc.*, 234 A.D.2d 725, 650 N.Y.S.2d 902 (1996).

Footnote 12. *Hardway Constr. Co. v. Brooks*, 416 So. 2d 837 (Fla. Dist. Ct. App. 1982). A motel is the "place of employment" of a traveling employee. Therefore, when an auditor, who had returned to his motel, was found murdered in a secluded place, it was a reasonable determination that the crime began at the motel. There had been violent crimes associated with the audited company. Death benefits were affirmed.

Footnote 12.1. *Pottinger v. Industrial Comm'n*, 22 Ariz. App. 389, 527 P.2d 1232 (1974). The claimant was required, because of his employment as insurance agency manager, to act as a host for a cocktail party in a hotel hospitality room. The cocktail party lasted from 5 P.M. until 1 A.M. After the cocktail party, the claimant remained overnight in a hotel room, where he was intoxicated. Inside the room he struck a match to light a cigarette. It dropped from his grasp and ignited his clothing, causing second and third degree burns on his hands, chest and shoulder. The employee had remained overnight in the hotel at his own expense. The court held that the claimant's attendance at the cocktail party was clearly within the course of his employment. Although the employee was not required to remain overnight by his employer, his required attendance at the cocktail party necessarily mandated that he obtain lodging at its conclusion.

While the claimant's intoxication was no automatic bar to recovery of workmen's compensation benefits, the court held that the burns were not compensable. Injuries which result from an accident arising out of personal comfort and convenience must

evolve from a risk peculiar to or increased by the employment. The risk of lighting a cigarette was in no way inherent in or increased by the claimant's employment. It was an act which would have occurred anywhere and in any place that the employee happened to be. **Treatise** quoted.

§ 25.03 Meals, Drinks, and Rest Intervals

In the case of employees required to live on the premises, it has been shown above that recoveries seem to require one of two factors: either (1) the source of the injury must have been directly traceable to the conditions under which the employee was required to live, or (2) the employee must have been at all times on call. It has also been suggested that traveling employees are similar in principle to resident employees.

[1] Traveling Employees Not on Call

Traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel-fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals.¹ So when a traveling employee slips in the street,² or is struck by an automobile,³ when traveling on foot or is involved in an accident while driving⁴ between the hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening,⁵ a day off,^{5.1} or involved an extended trip occasioned by the employee's wish to eat at a particular restaurant⁶ or bar.^{6.1}

However, it is quite possible to find, in particular circumstances, that a personal social motive was the occasion for an excursion which would otherwise be in the course of employment.⁷ For example, when a salesman whose official duties took him to Savannah went on an 18-mile sidetrip to "eat a seafood dinner and see the ocean," the journey was treated as a personal deviation.⁸ Similarly, a North Carolina employee, who injured his knee when he slipped and fell as he exited a professional baseball game in Chicago, where the employee had traveled to attend a food show generally related to his employment, did not sustain an accidental injury arising out of and in the course of his employment; his activity was a substantial personal deviation from the employment and the fact that the employee intended to attend a business function after the ball game did not mean that his deviation had ended.^{8.1} And when a traveling lawyer took his parents out to dinner while in the city where they lived and was injured by a fall while showing his father the way to the washroom, compensation was

denied in the District of Columbia, although the Court of Appeals for the District, in reviewing the case, made it quite clear that it would have granted an award had it had the authority to decide the case *de novo*.⁹

As indicated above, it should be emphasized that the injury must have its origin in a risk created by the necessity of sleeping and eating away from home; risks personal to the employee generally are excluded. Thus, the widow of an employee who suffered a heart attack while attending an out-of-state seminar and died as a result of complications that arose in the course of his treatment was denied workers' compensation benefits. Securing food and lodging or traveling by automobile were the sorts of risks inherent in business travel; the risks of major heart surgery for a preexisting condition were not.^{9.1}

Variations in the factual patterns of the cases can make a substantial difference in the outcome. For example, a Georgia court affirmed an award of death benefits to the survivors of a Florida resident and construction superintendent assigned to a project in Georgia, who lived in a company-provided apartment, and who died as a result of injuries sustained in a Sunday afternoon traffic accident as he returned to the apartment after taking some of his mother's furniture to a storage shed the superintendent owned in a nearby Georgia town. That the superintendent was on a personal errand and had been on sick leave from work due to knee surgery did not defeat the claim. The court held that at the time of the accident, the superintendent had completed the personal errand and was in the vicinity of the employer-provided apartment. His "continuous employment" status sufficiently broadened the course and scope of his employment as to bring the accident within the compensable category.^{9.2}

[2] Traveling Employees Continuously on Call

The question arises whether traveling employees who are continuously on call should be treated the same as resident employees in the category of cases in which no distinct employment-created hazard like a hotel fire or traffic risk is present. The simplest illustration is the unexplained fall. In *Employers' Liability Assurance Corporation v. Warren*,¹⁰ a traveling employee had been sitting on the hotel porch on a warm evening reading a magazine, and, as he rose to return to his room, he somehow fell and sustained injuries that resulted in his death. The Supreme Court of Tennessee affirmed an award, on the theory that the deceased's employment was continuous except when some distinct deviation for personal purposes was shown.

Resting and reading on the porch was no more a personal deviation in his case than resting during working hours is for a fixed-hours employee; and since this salesperson had no fixed hours, resting in the evening was no different than a pause in the course of his journey to get a drink of water would have been. Since this salesperson was on duty at all hours, the award here is consistent with the awards for unexplained falls in similar circumstances of domestic servants,¹¹ apartment house custodians¹² and the like. For similar reasons, compensation has been awarded for a heart attack in a hotel room, since the employee was on call at all times.¹³

FOOTNOTES:

Footnote 1. *E.g.* Fox v. National Carrier, 709 P.2d 1050 (Okla. 1985). Fox was a truck driver who had hauled a trailer for National to Kansas, dropped it off, and stayed overnight because he was to pick up another trailer for National in the morning. At breakfast he choked on a piece of sausage and started gagging. He vomited so violently that he ruptured a cervical disk, for which he later underwent surgery. The court, relying on the traveling employee rule in the **Treatise**, held that Fox's injury was compensable. **Treatise** quoted.

See also Hall v. Desert Aire, Inc., 2007 S.C. App. LEXIS 235 (S.C. Ct. App. Dec. 20, 2007). The employee, the national sales manager for the employer, went on a business trip to meet with agents of a company that sold the employer's products. The employee attended a dinner meeting at a sales agent's home. The employee and the agent consumed alcohol before and during the meeting. After the meal, the employee and the agent went riding in the agent's jeep. The employee sustained injuries when the jeep overturned. The appellate court found that substantial evidence supported the finding that the employee's injuries arose out of and in the course of his employment. The employee's purpose in traveling was wholly and exclusively in pursuit of his employment duties, nothing suggested he engaged in any activities of a personal nature, the custom and practice of the employer's employees was to frequently conduct the company's business in the context of entertaining, including the consumption of alcohol, and the employee was engaged in ongoing discussions regarding planning for sales activities on behalf of the employer at the time of the accident. **Treatise** quoted.

Footnote 2. Thornton v. Hartford Acc. & Indem. Co., 198 Ga. 786, 32 S.E.2d 816 (1945).

Cf. Kolson v. District of Columbia Dept. of Employment Servs., 699 A.2d 357 (D.C. Ct. App. 1997). The claimant here had worked as a bus driver for Greyhound Lines. At the end of his shift, at 4 A.M., he obtained a hotel lodging slip for a lodging at a specified hotel six blocks from the terminal. On his walk to the hotel, he was assaulted and injured. The court held that claimant's injury arose in the course of employment; it occurred while the claimant was engaged in a reasonable and foreseeable activity incidental to his employment. **Treatise** quoted.

Footnote 3. *E.g.* Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969). The decedent was attending a training school away from home, and after

classes returned to his hotel. He then walked several blocks to the river to look at some yachts, and then with several other employees began walking to the restaurant where they were to eat. While approaching the restaurant he was struck by a car and fatally injured. The death was held to be compensable, because even if the decedent had deviated from his employment while looking at yachts, he had clearly abandoned this personal activity, and was engaged in a business-connected pursuit while going to eat dinner.

✚Footnote 4. *Alexander Film Co. v. Industrial Comm'n*, 136 Colo. 486, 319 P.2d 1074 (1957). The claimant was awarded benefits for injuries received after being struck by a car while crossing the street from the restaurant to the motel.

✚Footnote 5. *Walker v. Speeder Mach. Corp.*, 213 Iowa 1134, 240 N.W. 725 (1931).

✚Footnote 5.1. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 117 P.3d 365 (2005), *review granted*, 156 Wn.2d 1024, 133 P.3d 473 (2006). The court accepted "the 'traveling employee' rule as consistent with Washington law." 128 Wn. App. at 851, 117 P.3d at 368. The claimant was a traveling employee. He was hired from his home state for work in another state on a job that was to take several weeks. He was required to arrange his travel through the employer, he was paid for his trip to the job location, and he received per diem pay for each day, including weekends, that he was in the job location. He was injured on a non-work day while crossing a street after leaving his hotel to go to a concert. The court explained that walking across a street near the hotel is not engaging in a personal activity, so his injury was compensable. **Treatise** quoted.

✚Footnote 6. *Leonard Van Stella, Inc. v. Industrial Acc. Comm'n*, 59 Cal. 2d 836, 31 Cal. Rptr. 467, 382 P.2d 587 (1963). A real estate saleswoman, on a three-day trip to view properties and visit friends, was found to be a "commercial traveler" under the "dual purpose" doctrine. Injuries she received in an automobile accident during a 19-mile deviation after locating a particular restaurant suggested by the customer-companion were deemed compensable. **Treatise** cited.

✚Footnote 6.1. *Thompson v. Keller Founds., Inc.*, 883 So. 2d 356 (Fla. Dist. Ct. App. 2004). The plaintiff, a traveling construction worker, met co-workers at a sports bar to play pool and eat snacks for one hour before leaving to drive to a restaurant for dinner. On this drive, the plaintiff was hurt in an accident where fault was attributed to the other driver. Even though the plaintiff may have been enjoying "amusement activities" just before his accident, the court found that the Judge of Compensation Claims did not, in his decision denying compensation, make adequate findings that the plaintiff was not "attending to a normal creature comfort and a reasonable necessity--driving to dinner--when his injuries were sustained." 883 So. 2d at 357. The case was reversed and remanded.

✚Footnote 7. *United States Fid. & Guar. Co. v. Skinner*, 188 Ga. 823, 5 S.E.2d 9 (1939).

✚Footnote 8. *United States Fid. & Guar. Co. v. Skinner*, 188 Ga. 823, 5 S.E.2d 9 (1939).

✚Footnote 8.1. *Jacobs v. Sara Lee Corp.*, 157 N.C. App. 105, 577 S.E.2d 696 (2003). Jacobs was an experienced sales representative with Sara Lee. As an incentive to its sales force, Sara Lee offered trips to food shows in various cities. Sara Lee provided

transportation and other expenses for the trips. Prior to his injury, Jacobs had attended some twenty of the events. The attendees were allowed to sight-see, to stay around their hotels, to attend or not attend the various events. Jacobs decided to go to a White Sox-Yankees baseball game, which was not one of the planned activities. When it started to rain, Jacobs decided to leave the game early and attend one of the sponsored activities. As he left the ball park, he slipped and was injured.

The court pointed out that it was not the moment that the employee *decided* to return from the deviation that mattered; it was whether in *fact* he had returned to the business route. Here Jacobs had decided to return to a sponsored event, but he was still in the ball park when the injury occurred. That fact supported the findings of the Commission.

☛Footnote 9. Hurley v. Lowe, 168 F.2d 553, 83 U.S. App. D.C. 123 (1948).

See also Bartlett v. Duke Univ., 284 N.C. 230, 200 S.E.2d 193 (1973).

For other cases involving choking, with results going both ways, *see* the following:

Klein v. Terra Chem. Int'l, 14 Md. App. 172, 286 A.2d 568 (1972).

Sheldon v. Broughton Corp., 42 A.D.2d 650, 345 N.Y.S.2d 219 (1973). An outside salesman died while eating a meal at a restaurant. The autopsy revealed that death resulted from a piece of meat which completely blocked air passage. The court held that the death resulted from a purely personal act and did not arise out of or in the course of employment.

Cf. Cole v. Union Carbide Corp., 50 A.D.2d 623, 374 N.Y.S.2d 741 (1975). The decedent, a lawyer, was having a business dinner in Boston, with colleagues who were working on the same case. He had an attack of vomiting, and he was asphyxiated. The court upheld the Board's award of death benefits. Although there was evidence that the lawyer had consumed a substantial amount of alcohol before and during dinner, the court held that the decedent's actions were not so unreasonable as to render the accident solely due to personal acts.

And cf. Travelers Ins. Co. v. Majersky, 531 S.W.2d 765 (Mo. Ct. App. 1975). A newspaper editor choked to death on a piece of meat at an awards banquet which he attended at the direction of his employer. The court held that the death was caused by an "accident" within the meaning of the workmen's compensation law and that it "arose out of" the editor's employment. The court declined to find unreasonable an inference drawn by the industrial commission that stress and the need to eat hastily caused an employment hazard at the banquet.

☛Footnote 9.1. La Tourette v. Workers' Comp. App. Bd., 17 Cal. 4th 644, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

☛Footnote 9.2. Ray Bell Constr. Co. v. King, 281 Ga. 853, 642 S.E.2d 841 (2007).

☛Footnote 10. Employers' Liability Assurance Corporation v. Warren, 172 Tenn. 403, 112 S.W.2d 837 (1938).

Regan v. Food Store Demonstration, Inc., 12 A.D.2d 852, 209 N.Y.S.2d 962 (1961). The claimant fell in room she had obtained for the night. She was required to

stay overnight and "remain in a particular place as part of her duties." The court recognized coverage for activities during an enforced lull (Ch. 21, § 21.07[4], *above*) and applied theory to activities of traveling employees.

Footnote 11. *Martin v. Plaut*, 293 N.Y. 617, 59 N.E.2d 429 (1944).

Footnote 12. *Mowen v. Chase Nat'l Bank*, 277 N.Y. 135, 13 N.E.2d 607 (1938), and see other illustrations at the same point in the text.

Footnote 13. *Joy v. Florence Pipe Foundry Co.*, 64 N.J. Super. 13, 165 A.2d 191 (1960). **Treatise** cited.

Rogers v. State Acc. Ins. Fund, 289 Or. 633, 616 P.2d 485 (1980).

But cf. Travelers Ins. Co. v. Googe, 217 Tenn. 272, 397 S.W.2d 368 (1965).

§ 25.04 Bathing and Dressing

The greatest difficulty arises when the question is whether a traveling employee should receive compensation for injuries due to slipping in the bathtub in a hotel, cutting oneself with a razor, or being hurt while getting a haircut or calling for one's laundry. In *Davidson v. Pansy Waist Company*,¹ the claimant had arisen in the morning and arranged the samples in his rooms. Then while still in his pajamas, he had gone to the bathroom to take a bath, had slipped in the tub and had been scalded by boiling water. Compensation was denied by the New York Court of Appeals, on the ground that:

While it may be that at the time the claimant sustained his injuries he was making himself ready to perform his regular daily work as a salesman, such preparation cannot be said to be a part of his employment, and it does not appear that he might not have prepared himself in exactly the same way if engaged in any other employment or vocation.²

There may be detected here the echoes of the "peculiar risk" test, which, as shown in the preceding chapter, is now obsolete in New York.³ It is no longer material that the claimant might have encountered the same risk in some other occupation, or even unemployed, provided *this* occupation in fact subjected him to *this actual risk*.

The idea in the quotation that a salesperson's ministering to personal appearance in preparation for the day's work is not "a part of his employment" has been discredited in a later case in which compensation was awarded to a traveler who got a hairbrush bristle in his eye when the train jolted while he was brushing his eyebrows.⁴

This award, affirmed by the Court of Appeals, thus places such preparatory acts by traveling employees firmly within the "course" of employment. Any subsequent denials must therefore logically rest on lack of causal connection. And, of course, the causal connection between the employment and injury is just as strong when a salesman slips in a hotel bath as when a resident hospital porter slips in his bath.⁵

The Court of Appeals of New York did indeed subsequently make an award for a fall in a shower.⁶ The claimant was attending a tree surgery convention, and examined moss, wood, and insects during a field conference. It was a hot day, and the claimant became "grubby." In getting ready for the evening session he slipped in the bathtub as he was preparing to take a shower. Compensation was awarded.

At this point the New York story might appear at last to have achieved a consistent pattern. But several years later the Appellate Division denied compensation in a decision which appears to be a throwback to the *Davidson* case.⁷ A traveling insurance examiner prepared some papers for the next day in his hotel room. His face and hands became smudged from the carbon paper, and he decided to take a shower at night instead of the next morning, as was his usual custom. The court held that the shower accident occurred during a "purely personal act" which was not a "requisite of employment."

In 1984, however, the New York Court of Appeals got this class of cases back on track with its opinion in *Capizzi v. Southern District Reporters, Inc.*⁸ The claimant, a transcriber-typist for a court reporting firm, had been sent by her employer to Toronto, Canada, to transcribe notes of depositions being taken there. The next morning, while taking a shower to prepare for her return to New York, she slipped and fell in the hotel bathtub. The Board awarded benefits, the Appellate Division reversed, and an appeal was taken to the Court of Appeals.

The court reviewed the conflicting decisions in "bathtub cases" in the past, finding the results of those cases "difficult to reconcile." It concluded that there was "no reason to continue to make a distinction in those cases in which traveling employees sustain injuries while bathing or showering." The court favored the view applied by the Board, under which such accidents are compensable if the employee is required to travel on the employer's business, is directed to remain at a certain place for a specified length of time, and is injured while engaged in a reasonable activity. The Board's award of benefits was

reinstated.

Such preparatory acts as bathing and dressing in the morning cannot be distinguished from each other. Therefore, when the Court of Appeals made the award in *Martin v. Plaut*⁹ to a cook who fell while dressing, it attempted to distinguish the *Davidson* case by putting domestic workers completely in a class by themselves. An examination of its defense of this kind of legal reasoning will show whether such compartmentalization of workers is sound. The alleged distinctions relied on by the court are listed in full in the form of a quotation from the similar California case¹⁰ which awarded compensation to a domestic worker who fell from a stool while adjusting the hem of her street dress; the parenthetical comments are the author's:

A household servant is in a different category from most other employees. Normally she does not work, and this particular employee did not work, during definite hours. She is always on call.

(But the same is true of most traveling employees. They call on customers, make reports, provide business entertainment, keep in touch with headquarters and take care of their samples and equipment at all hours of the day and night. Suppose, for example, a salesperson is taking a bath in the morning when the employer calls on the phone and tells the employee to rush at once to the docks to call on a customer before the latter leaves for Europe. The salesperson would have to comply or risk being fired.)

The employment requires her to live on the premises.

(And the employment requires the salesperson to live on the hotel premises, which is just as alien to a normal home life as living in someone else's private home--in fact, much more alien, involving, as it does, a class of risks different from those of an ordinary private residence.)

She must be neat in dress and general appearance. It is necessary contemplated by the employment that she must perform personal acts such as she was performing while she is in her room on call.¹¹

(Again, this is even more true of a salesperson. Untidiness in a domestic servant's appearance may be annoying to the employer, but untidiness in a salesperson's appearance will cost the employer losses in dollars and cents. The advertisements of various pharmaceutical houses are quite emphatic on the point that men's "five-o'clock

shadow," B.O., and dandruff cause salespersons to be turned back at the outer office by frowning receptionists.)

The court then goes on to say that the same cannot be said of "an employee such as a stenographer who works set hours." In short, the court has done a thorough job of distinguishing a cook from a stenographer, had completely forgotten even to attempt to distinguish a cook from a traveling salesperson, and then has announced that it has distinguished the case of the traveling salesperson in *Davidson v. Pansy Waist Co.* ¹²

It will be observed that the preceding argument has been based, not on the abstract merits of covering falls by traveling employees in bath tubs, but solely on the issue of achieving consistent treatment for classes of employees who, for compensation purposes, are indistinguishable in principle.

It may very well be that a court will prefer to say, as the Wisconsin court did in the *Gibbs* case, that "sleeping and making a toilet are not a part of traveling but of living."¹³ Having said this, however, the court cannot consistently make hotel-fire awards, or awards to domestic servants who fall while dressing, or awards to bunk-house residents injured while asleep.¹⁴ But because the great majority of courts have shown an inclination to cover on-premises on-call employees during most such incidental or preparatory acts,¹⁵ the bulk of the present discussion has taken these precedents for granted and then gone on to show their significance when carried over to the related category of traveling employees.

FOOTNOTES:

¹²Footnote 1. *Davidson v. Pansy Waist Company*, 240 N.Y. 584, 148 N.E. 715 (1925).

¹³Footnote 2. 148 N.E. 715, 715.

¹⁴Footnote 3. See Ch. 5, § 5.04[3], and Ch. 6, § 6.04, *above*.

¹⁵Footnote 4. *Lief v. A. Walzer & Son*, 248 App. Div. 651, 287 N.Y. Supp. 991 (1936), *aff'd*, 272 N.Y. 542, 4 N.E.2d 727 (1936).

But see *Shultz v. Nation Assocs., Inc.*, 281 App. Div. 915, 119 N.Y.S.2d 673 (1953). A nontraveling employee was hit in the eye with a comb while preparing to go to lunch. Compensation was denied.

¹⁶Footnote 5. *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).

See also *Lenzner Coach Lines v. Workmen's Comp. App. Bd.*, 158 Pa. Commw. 582, 632 A.2d 947 (1993).

☛Footnote 6. *Miller v. F. A. Bartlett Tree Expert Co.*, 3 N.Y.2d 654, 171 N.Y.S.2d 77, 148 N.E.2d 296 (1958).

Accord: *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of America v. Adler*, 340 F.2d 799, 119 U.S. App. D.C. 274 (1964). The claimant was injured while taking a shower in preparation for a convention banquet he was attending as a representative for his union. The award of compensation was affirmed.

☛Footnote 7. *Friedwald v. New York State Ins. Dept.*, 17 A.D.2d 670, 230 N.Y.S.2d 48 (1962).

Covel v. New York State Court of Claims, 30 A.D.2d 736, 291 N.Y.S.2d 384 (1968).

Paduano v. New York State Workmen's Comp. Bd., 30 A.D.2d 1009, 294 N.Y.S.2d 318 (1968), *aff'd*, 25 N.Y.2d 669, 306 N.Y.S.2d 476, 254 N.E.2d 776 (1969).

See also Ch. 21, § 21.06[4], *above*, for further examples of the legal impact of varying attitudes toward the necessity of bathing.

☛Footnote 8. *Capizzi v. Southern District Reporters, Inc.*, 61 N.Y.2d 50, 471 N.Y.S.2d 554, 459 N.E.2d 847 (1984).

See also *Aetna Cas. & Sur. Co. v. Orgon*, 721 S.W.2d 572 (Tex. Ct. App. 1986), *writ denied* (March 18, 1987).

☛Footnote 9. *Martin v. Plaut*, 293 N.Y. 617, 59 N.E.2d 429 (1944).

Cf. *Kaplan v. Zodiac Watch Co.*, 20 N.Y.2d 537, 285 N.Y.S.2d 585, 232 N.E.2d 625 (1967). The claimant, a traveling salesman, was injured while on a trip when he got tangled putting on his trousers in the morning, allegedly in a rush in order to leave before the heavy traffic began. The court reversed an award of compensation, holding that the risk was purely personal, and not attributable to the environment brought about by the employment. **Treatise** cited.

☛Footnote 10. *Employers' Liab. Assur. Corp. v. Industrial Acc. Comm'n*, 37 Cal. App. 2d 567, 99 P.2d 1089 (1940).

☛Footnote 11. 99 P.2d 1089, at p. 1092.

☛Footnote 12. *Davidson v. Pansy Waist Company*, 240 N.Y. 584, 148 N.E. 715 (1925).

☛Footnote 13. *Gibbs Steel Co. v. Industrial Comm'n*, 243 Wis. 375, 10 N.W.2d 130, 131 (1943).

Compare the more recent Wisconsin posture, exemplified both by the special statute cited at Ch. 25, § 25.03[1] n.6, *above*, under *Wisconsin*, and by the case of *Western Condensing Co. v. Ind. Comm'n*, 262 Wis. 458, 55 N.W.2d 363 (1952).

See *also* Kozlowski v. Howard Sober, Inc., 234 A.D.2d 725, 650 N.Y.S.2d 902 (1996).

Footnote 14. The court's distinction of bunk-house cases on the ground that residence there is required, while here the employee picks his own hotel or tourist cabin, has already been discussed in Ch. 25, § 25.02, *above*. This distinction has been uniformly rejected in hotel-fire cases, since it very rarely happens that the employer directs the employee to occupy a named hotel.

Footnote 15. See Ch. 24, § 24.02[1], *above*.

§ 25.05 Extension of Rule in Camp Show Cases

[1] Original Camp Show Cases

The unstable condition resulting from this kind of compartmentalizing of employees is further shown by several New York Appellate Division awards which went far beyond anything previously heard of in breadth of coverage of traveling employees--the beneficiaries of this expansion being traveling U.S.O. entertainers. Awards were made on the following fact combinations: the claimant was injured in a traffic accident while on his way to pick up his laundry in Germany shortly after the war;¹ a theatrical manager on tour in Louisiana fell while descending a stairway leading to a basement barber shop to which he was going for a haircut and shave;² a dancer was injured while returning from a week's vacation with pay in Paris;³ and a musician was struck by an automobile in San Francisco while returning to his hotel from a visit to another hotel to see a friend.⁴

All the opinions are brief, and none makes any attempt to reconcile the results with the New York cases on traveling employees generally. Is there something exotic or magic about being a traveling entertainer that justifies a distinction between a flute-player and a humble salesman for the Pansy Waist Company? The Court of Appeals of New York apparently thought so, when it later supplied the following rationale for the camp show cases:

When such travel is performed in foreign lands, where strange customs or abnormal conditions prevail, the risk involved in traveling from a place of reasonable personal diversion to the appointed place for service may also come within the coverage afforded by the employer's compensation insurance.⁵

[2] Extension to Distant Travel With Special Risks

Sometimes the unusual nature of the risk that operated in the particular case lent support to this explanation, as in the leading case of *Lewis v. Knappen Tippetts Abbett Engineering Co.*⁶ The deceased was a consultant engineer hired in New York and eventually sent to Israel for an assignment. Having completed most of his work, the day before he was to leave he accepted an invitation to go on a sight-seeing tour from Tel Aviv to Jerusalem in a United Nations convoy. During the trip he was shot and killed by unidentified Arabs in uniform. At this time there was a truce between the Israel and Arab forces. In awarding compensation the court relied on the following:

(1) In employment far from home, excursions to nearby places of interest are available and expected.

(2) The employer did not object to reasonable sight-seeing.

(3) Death did not result from encountering risk commonly met by members of the public in the routine of daily life.

(4) He was still on the payroll and subject to call at all times even while on the trip.

The court relied heavily on the camp show cases to reach this result.

But in some of the camp show cases, it is difficult to see how the location or the nature of the risk could form the basis for a special rule. In the *Gianniny* case, the court said that the claimant, while in Germany, was in a zone of danger. Even if this was so, it had no bearing on the particular mission to pick up laundry, or the form of the accident, which was a simple skid by the truck in which the claimant was riding. Moreover, two of the four cases occurred in Louisiana and San Francisco, which although they claim a continental atmosphere, are ordinary domestic points of call for traveling employees of all kinds.

The truth is that nothing can be said about these traveling entertainers that cannot with equal and sometimes greater force be said about most other traveling employees. In the *Gianniny* case, the court said, "He was obliged to keep his stage clothing and stage laundry cleaned and pressed at all times." The same, of course, is true of the traveling salesperson. The entertainers were on call at all times, but the facts show that they were no more so than the average traveling employee. In fact, the dancer in the *Scott* case was on vacation at the time of the accident. True, the vacation was in Paris, but there is no reason why the mere transference of the locus of injury to foreign soil should

necessitate an entire new set of rules. The court cited the *Lepow* case,⁷ in which a traveling man acquired malaria in South Africa; but the whole point of that decision was that the risk of getting malaria was a distinct risk of a mission to that locality, while there is nothing to show that the automobile accident on the dancer's return from her vacation was any different from an accident that might happen anywhere.

This is not meant necessarily to imply disapproval of the award; it is only meant to suggest that one cannot have forever standing side by side in the same jurisdiction a rule which awards compensation to a traveling employee who is on vacation or getting a haircut, and another rule which denies compensation to a traveling employee who is injured while selecting a hotel room⁸ or walking down the hotel stairs actually on the way to a business call⁹ or waiting in the street between trains,¹⁰ merely on some artificial distinction between traveling entertainers and traveling employees generally. For this reason, it is not surprising, particularly in view of the change of attitude evidenced by the later hotel-fire cases,¹¹ to find the New York rule on traveling employees gradually being assimilated more and more to the rules for domestic servants, resident employees generally, and traveling entertainers.

[3] Extension of Broad Rule to All Travel

It is a familiar sight in compensation law to observe a doctrine getting started in the form of an apparently exceptional concession in an unusual or limited class of cases, only to be followed by the necessity of extending the supposedly exceptional rule to more and more comparable cases, until ultimately the exception has become the rule. The working out of this process in New York is well illustrated by the case of *Schneider v. United Whelan Drug Stores*.¹² There an employee who had completed his business in Florida and who was waiting for his plane accepted a boat ride in the meantime and was drowned in the course of it. This was held to be compensable.

The court referred to "[m]any recent decisions to the effect that when an employee is required to travel to a distant place on the business of his employer and is directed to remain at that place for a specified length of time, his status as an employee continues during the entire trip, and any injury occurring during such period is compensable, so long as the employee at the time of injury was engaged in a reasonable activity."¹³

In a later case, *Dow v. Collins*,¹⁴ the distance between the employee's home and the distant business site was 150 miles and still within New York State. An employer was engaged in constructing a steel dock on Buck Island in Lake Placid and hired Dow to do the welding work. The employer arranged for all the workers to live in a house on the mainland, but Dow received special permission to stay on the island with his welding equipment. One evening, the workers toiled until 9:00 p.m., at which time Dow took them across to the mainland in a small boat, intending to return to the island. At 1:00 a.m., the boat was observed unoccupied, running in a tight circle off the South coast of the island. Dow was never seen again.

The employer contended Dow's presence on the lake was purely personal, having nothing to do with the employment. The court disagreed. Dow had brought fishing equipment with him. Fishing and boating were reasonable activities considering the circumstances and the fact that Dow was far from home. Citing *Schneider*, the court held that an employee who must remain away from home retains his or her employment status while indulging in normal activities at the location of the work.

This is a far cry from *Davidson v. Pansy Waist Company*,¹⁵ which denied compensation to a traveling man who was scalded when he slipped in his bath in a hotel. Presumably all such activities of traveling employees should now be deemed covered, since surely bathing is just as "reasonable" as boating.¹⁶

The "exceptional" cases from which this general rule evolved were principally the U.S.O. entertainer cases, and the resident domestic servant cases. As we have seen, a series of decisions, which at the time were confined to U.S.O. troupes, brought within the course of employment such accidents as a fall when the employee was on the way to get a haircut, and a traffic injury when the employee was on the way to visit a friend in another hotel.

It was a small step from this to the case of *Lewis v. Knappen Tippets Abbott Engineering Company*.¹⁷ At this stage, however, the Court of Appeals was still hedging the rule about carefully. The employment was far from home;¹⁸ excursions to nearby places might be expected; death resulted from a risk not commonly met by the public in a routine daily life. In short, there was still something exotic about the circumstances of the employment and the injury.

At the same time, however, two other lines of cases were expanding

within their own orbits. The resident servant cases had extended to an unexplained fall just after the servant arose in the morning¹⁹ and had gone on to cover a servant's walk about the premises while off duty²⁰ a walk to return a book to a friend during a rest period²¹ and a journey to visit a friend on the premises.²²

The other line of cases whose expansion has contributed to the final result is the "lull-in-the-work" group.²³ Two New York cases carry this principle about as far as it has yet been extended. *Penzara v. Maffia Brothers*,²⁴ held compensable an injury to an auto shop employee who was injured while repairing his own car during a lull in work. He had permission to do this, and used the employer's tools. Significantly, the court relied heavily on cases involving traveling employees and camp show entertainers. In a later case, *Ingraham v. Lane Construction Corporation*,²⁵ the Appellate Division applied the same rule to an employee who, while in a friend's car until mud could be cleared away and the work started, whiled away the time by fixing the dash light in the car, and blinded one eye when his screwdriver slipped.

All these streams merge to form the final generalization quoted from the *Schneider* case. The lull-in-work element was present, since the employee had to kill some time while waiting for his plane. The idea that being on call helps to bring the employee within the course of employment in borderline cases reflects the reasoning of some of the resident servant cases. And particularly the doctrine of continuation of a traveling employee's status throughout the trip, which got its origin in cases with exotic trappings and settings, inexorably swelled until it covered, not only a cloak-and-dagger incident involving mysterious Arabs in a far-off land, but an ordinary drowning occurring on an ordinary domestic business trip.

FOOTNOTES:

Footnote 1. *Gianniny v. Camp Shows, Inc.*, 272 App. Div. 1089, 74 N.Y.S.2d 537 (1947).

Adair v. Metropolitan Building Co., 38 Mich. App. 393, 196 N.W.2d 335 (1972). The claimant lived on the employer's premises and was on 24-hour call. He was injured on the premises while leaving to go to a laundromat to do his personal laundry. Award of benefits was affirmed. **Treatise** quoted.

Contra Reynolds v. B-Neat Tank Cleaning Corp., 425 So. 2d 881 (La. Ct. App. 1983).

Footnote 2. *Block v. Camp Shows, Inc.*, 272 App. Div. 980, 72 N.Y.S.2d 681 (1947), *appeal denied*, 272 A.D. 1081, 75 N.Y.S.2d 501 (1947). The court relied on *Tushinsky v. National Broadcasting Co.*, 265 App. Div. 301, 38 N.Y.S.2d 608 (1942),

appeal dismissed, 292 N.Y. 595, 55 N.E.2d 369 (1944), in which compensation was awarded to a traveling musician who, during his free time, was injured in traffic while wandering around Rio de Janeiro.

Footnote 3. *Scott v. U.S.O. Camp Shows, Inc.*, 274 App. Div. 862, 82 N.Y.S.2d 118 (1948), *aff'd*, 298 N.Y. 896, 84 N.E.2d 808 (1949).

Young v. Henry M. Young, Inc., 56 A.D.2d 941, 392 N.Y.S.2d 502 (1977).

Silfvernagel v. Swedish Am. Line Agency, Inc., 26 A.D.2d 858, 274 N.Y.S.2d 447 (1966).

Footnote 4. *De Santis v. U.S.O. Camp Shows, Inc.*, 275 App. Div. 880, 88 N.Y.S.2d 732 (1949).

Footnote 5. *Davis v. Newsweek Magazine*, 305 N.Y. 20, 110 N.E.2d 406, 409 (1953). Compensation was denied, by a four to three vote, to an editor killed while swimming in the ocean during a combined business and vacation trip. His swimming was attributable to the vacation aspect of his travel.

Footnote 6. *Lewis v. Knappen Tippetts Abbett Engineering Co.*, 304 N.Y. 461, 108 N.E.2d 609 (1952).

Footnote 7. *Lepow v. Lepow Knitting Mills, Inc.*, 288 N.Y. 377, 43 N.E.2d 450 (1942).

Footnote 8. *Jakeway v. John V. Bauer Co.*, 218 App. Div. 302, 218 N.Y. Supp. 193 (1926).

Footnote 9. *Turner v. Cathedral Publishing Co.*, 243 App. Div. 826, 278 N.Y. Supp. 229 (1935), *aff'd*, 268 N.Y. 656, 198 N.E. 542 (1935).

Footnote 10. *Priestley v. H. Hentz & Co.*, 234 App. Div. 804, 253 N.Y. Supp. 894 (1931), *aff'd*, 258 N.Y. 618, 180 N.E. 358 (1932).

Footnote 11. *McKay v. Republic Vanguard Ins. Co.*, 20 N.Y.2d 884, 285 N.Y.S.2d 857, 232 N.E.2d 854 (1967), *In re Buck's Estate*, 277 App. Div. 126, 98 N.Y.S.2d 734 (1950), and *Blake v. Grand Union Co.*, 277 App. Div. 914, 98 N.Y.S.2d 738 (1950).

Footnote 12. *Schneider v. United Whelan Drug Stores*, 284 App. Div. 1072, 135 N.Y.S.2d 875 (1954).

See also *CBS, Inc. v. Labor & Indus. Review Comm'n*, 219 Wis. 2d 564, 579 N.W.2d 668 (1998). The claimant was a member of a crew providing television coverage of the 1994 Winter Olympics. On their off time, the crew went skiing and it was then that the claimant fell and injured his knee. The court held that the claimant's injuries were compensable. Citing *Hansen v. Industrial Comm'n*, 258 Wis. 623, 46 N.W.2d 754 (1951), the court noted that Wis. Stat. § 102.03(1)(f) provided a presumption in favor of coverage for traveling employees. It reflected the understanding that traveling employees are not required to remain in their hotel rooms after the work of the day is completed in order to avoid the risk of "deviating" from their employment.

Footnote 13. 135 N.Y.S.2d 875, at p. 876.

See:

Chicago Bridge & Iron, Inc. v. Industrial Comm'n, 248 Ill. App. 3d 687, 188 Ill. Dec. 573, 618 N.E.2d 1143 (1993), *reh'g denied* (Sept. 8, 1993).

Capitol Int'l Airways, Inc. v. Workmen's Comp. App. Bd., 58 Pa. Cmwlth. 551, 428 A.2d 295 (1981).

McCann v. Hatchett, 19 S.W.3d 218 (Tenn. 2000).

Cf. Bailey v. Industrial Comm'n, 247 Ill. App. 3d 204, 187 Ill. Dec. 97, 617 N.E.2d 305 (1993).

Footnote 14. Dow v. Collins, 22 A.D.2d 250, 254 N.Y.S.2d 554 (App. Div. 1964).

See also Insulated Panel Co. v. Industrial Comm'n, 318 Ill. App. 3d 100, 252 Ill. Dec. 882, 743 N.E.2d 1038 (2001). The claimant injured his leg in a fall during a sightseeing excursion while on a business trip to Hawaii. The court held that the injury arose out of and in the course of employment, because the claimant was a traveling employee, and the commission's finding that the activity was reasonable and foreseeable was not against the manifest weight of the evidence.

Footnote 15. Davidson v. Pansy Waist Company, 240 N.Y. 584, 148 N.E. 715 (1925).

Footnote 16. *But cf.* the later case of Friedwald v. New York State Ins. Dept., 17 A.D.2d 670, 230 N.Y.S.2d 48 (1962), which follows reasoning similar to that in the Davidson case.

Footnote 17. Lewis v. Knappen Tippetts Abbett Engineering Co., 304 N.Y. 461, 108 N.E.2d 609 (1952).

Footnote 18. See Markoholz v. General Elec. Co., 13 N.Y.2d 163, 243 N.Y.S.2d 853, 193 N.E.2d 637 (1963), applying the rules of "camp show" cases to a businessman's recreational deviation to Italy from the direct route back from a convention in Paris.

Footnote 19. Martin v. Plaut, 293 N.Y. 617, 59 N.E.2d 429 (1944).

Footnote 20. Carroll v. Westport Sanitarium, 131 Conn. 334, 39 A.2d 892 (1944).

Footnote 21. Caney v. Straight, 274 App. Div. 1077, 85 N.Y.S.2d 626 (1949).

Footnote 22. Lewis v. River Crest Sanitarium Co., 277 A.D. 914, 99 N.Y.S.2d 65 (1950), *aff'd*, 302 N.Y. 655, 98 N.E.2d 474 (1951).

Footnote 23. See Ch. 23, § 23.07[5], and Ch. 21, § 21.07[4], *above*.

Footnote 24. Penzara v. Maffia Brothers, 307 N.Y. 15, 119 N.E.2d 570 (1954).

Footnote 25. Ingraham v. Lane Construction Corporation, 285 App. Div. 572, 139

N.Y.S.2d 347, *aff'd*, 309 N.Y. 899, 131 N.E.2d 577 (1955).

See also Wisconsin Elec. Power Co. v. Labor and Indus. Review Comm'n, 226 Wis.2d 778, 595 N.W.2d 23 (1999).